IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1564

JAMES JONATHAN MAPP, et al.,

Petitioners,

vs.

THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, TENNESSEE, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CASES

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Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled cause on October 20, 1975 and January 27, 1976.

Opinions Below

The District Court memorandum and order of June 20, 1974 are unreported and are printed in the appendix hereto, App. 1a, 6a. The Court of Appeals opinion of October 20, 1975 is reported at 525 F.2d 169 (6th Cir. 1975) and is printed in the appendix hereto, App. 8a. The Court of Appeals opinion of January 27 denying rehearing and rehearing *en banc* is reported at 527 F.2d 1388 (6th Cir. 1976) and is printed in the appendix hereto. App. 28a.

Jurisdiction

The judgment of the Court of Appeals was entered on October 20, 1975 (App. 8a). On January 27, 1976, the Court of Appeals denied application by petitioners herein for rehearing *en banc* (App. 28a). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Question Presented

Were the lower courts correct in finding that a 1971 zoning desegregation plan for high schools in Chattanooga, Tennessee was constitutionally sufficient and required no modification which, in July 1974, left 59% of the black high school student population in two traditionally black facilities where integral portions of that plan for elementary and junior high designed to achieve desegregation at those levels had not been fully implemented at that time, majority-to-minority transfer provisions of the plan had not been implemented for elementary and junior high levels as proposed, the plan for high schools itself had not been fully implemented, and where significant changes had occurred in population and pupil attendance patterns and in the configuration of the system as a result of annexation during the over two-year span between the time the plan was developed and the date it received final district court approval.

Constitutional Provision Involved

This case involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

Statement of the Case

History of the Litigation

This action was commenced on April 6, 1960 on behalf of a class of black children and parents seeking an end to state-imposed racial segregation in Chattanooga, Tennessee public schools. Proceedings pertinent to this petition commenced in 1971.[1]

On May 19, 1971 the district court held that the Chattanooga Board of Education (hereinafter Board) had failed to create a unitary system and directed it to develop a plan to be implemented by September, 1971. On July 26, 1971, the court approved, with certain minor revisions, the Board's Amended Desegregation Plan for elementary and junior high schools; it withheld final approval, however, of the high school plan pending receipt of data on capacity of four academic curriculum high schools and directed the Board to implement the proposed high school plan as an interim measure in September, 1971. 329 F.Supp. 1374 (E.D. Tenn. 1971). Shortly thereafter, the court granted the Board permission to delay implementation of those portions of elementary and junior high plans which could not be effectuated until additional transportation facilities were acquired.

On February 4, 1972 the district court gave final approval to the Board's plan to establish a system-wide vocational-technical high school, but withheld such approval with respect to the zoning proposal for the other four high schools, directing officials to report by June 15, 1972 on whether

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[1] The history of petitioners' efforts to achieve a unitary system in Chattanooga between 1960 and 1967 is recounted in: 295 F.2d 617 (6th Cir. 1961); 203 F.Supp. 843 (E.D. Tenn. 1962), *aff'd* 319 F.2d 571 (6th Cir. 1963); 373 F.2d 75 (6th Cir. 1967); and 274 F.Supp. 455 (E.D. Tenn. 1967).

further desegregation was required at that level. It ordered that elementary and junior high school desegregation be implemented fully not later than fall, 1972. Appeals were taken with respect to district court judgments entered between July, 1971 and February, 1972 which were affirmed *en banc* on April 30, 1973. 477 F.2d 851 (6th Cir. 1973). Certiorari was denied by this Court on November 12, 1973. 414 U.S. 1022 (1973).

On July 20, 1973, the Board moved for further relief seeking an adjustment of the 1971 desegregation plan approved by the trial court on July 26, 1971, as amended by subsequent orders. The Board's motion was denied by the district court on November 16, 1973, which ordered that complete implementation of the 1971 plan be accomplished no later than by the beginning of the January, 1974 semester. The court also gave its final approval at that time to the Board's 1971 plan for high school desegregation. 366 F.Supp. 1257 (E.D. Tenn. 1973).

On December 24, 1973, petitioners filed a motion to amend the November 16, 1973 opinion and for a new trial and/or further relief. The motion sought an order requiring the Board to develop a new desegregation plan rather than to implement fully the 1971 proposal. By memorandum and order of June 20, 1974, the district court denied petitioners' December 24, 1973 motion.

The Board appealed from the order of November 16, 1973 denying its motion to amend the desegregation plan, which it asserted became final upon the denying on June 20, 1974 of petitioners' motion to amend and for a new trial or further relief. Petitioners appealed directly from the June 20, 1974 denial of their motion by the district court.

On October 20, 1975, the Court of Appeals for the Sixth Circuit affirmed the trial court's rulings. (App. 8a) Re-

hearing and rehearing *en banc* were denied by that court on January 27, 1976 (App. 28a). The Board filed a petition for a writ of certiorari from this Court on January 29, 1976, which has not been acted upon as of this date. *Board of Education of the City of Chattanooga* v. *Mapp*, No. 75-1077, O.T. 1975 (44 U.S.L.W. 3445).

History of Desegregation in Chattanooga

In 1962, the trial court approved an eight-year plan of desegregation involving gradual conversion from dual geographic zones to unitary zones for elementary and junior high grades and continued use of freedom of choice on the high school level, extending that choice to black students for the first time in 1967. During the 1962-63 academic year eighteen (18) all-black schools were maintained—one senior high, three junior high and fourteen elementary schools.

Though implementation of this plan was accelerated in August, 1965 by the Court to ensure its completion by September, 1965, a number of all-black or virtually all-black schools were still in operation. Twelve (12) elementary schools were between 96-100% black; four (4) junior highs were 99-100% black; and two (2) senior highs were 99 and 100% black respectively. The all-black elementaries enrolled 82% of the system-wide black elementary population; the all-black junior highs enrolled 73.5% of the system-wide total; and the all-black highs enrolled 83.9% of the system-wide total of black students at that grade level. At that time the racial ratio for the entire system was 48.8% black and 51.2% white.

On May 19, 1971, the district court found that previous plans had not succeeded in accomplishing a unitary system and directed the Board to submit further plans for the final accomplishment of a unitary school system in Chatta-

nooga. The Board's plan proposed to accomplish a ratio of not less than 30% nor more than 70% of any race in most elementary and junior high schools in the system through techniques of pairing, clustering, rezoning and majority-to-minority transfers. Seven schools were to be closed.

Insofar as high schools were concerned, the Board proposed to retain the five facilities then in use. Four schools —two all-black (Howard and Riverside) and two majority white schools (Brainerd and Chattanooga)—would be rezoned and utilized solely for academic programs. Zones for these schools would be drawn to ensure that the newly-created junior high zones fed into them. Kirkman, which offered only technical and vocational training, would be left unzoned; vocational-technical programs at Howard and Riverside, the two black schools, would be transferred to Kirkman. As a result, changes in the racial compositions at the high schools would be as follows:

	1970-71		*Proposed (1971 Plan)*	
	% B	*% W*	*% B*	*% W*
Brainerd	14	85	32	68
Chattanooga	10	90	44	56
Howard	100	0	70	30
Riverside	99	1	68	32
Kirkman	11	89	45	55

The Board's projections for the high schools were dependent in large part upon the extent to which proposals for elementary and junior high facilities were realized. Additionally, the plan contained a majority-to-minority transfer provision like that approved by this Court in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 26-27 (1971).

On July 26, 1971, the district court approved the Board's proposals for desegregation of elementary and junior high

grades but granted only tentative approval to the high school plan. Though it permitted the high school plan to be implemented on an interim basis in September, 1971, the Court directed the Board to provide it with additional information on capacities of the facilities involved and on the extent to which non-resident tuition students, from surrounding Hamilton County and elsewhere, were enrolled in Chattanooga high schools.

In September, 1971, most of the Board's desegregation proposals for desegregation of the elementary and junior highs, including majority-to-minority transfers, were not implemented. New zones were established for the four academic high schools and one vocational-technical high was opened on a system-wide basis. A number of vocational-technical courses continued to be offered, however, at the two traditionally all-black high schools. Since the plan was not implemented in any meaningful sense in September, 1971, the Chattanooga school system at that time had ten 99-100% black elementaries and four 99-100% black junior highs. Racial ratios at the high schools in September, 1971 as compared to those projected in the plan were as follows, excluding students still assigned to vocational-technical courses in the two black highs:

	% B Projected	*% B Actual*
Kirkman	45	25
Brainerd	32	33
Chattanooga	44	33
Howard	70	96
Riverside	68	97

No implementation of elementary provisions of the Board's 1971 plan had occurred by the start of the 1972-73 academic year. As of October 9, 1972, the Chattanooga system had five (5) all-black elementaries and five (5)

others with black ratios between 92 and 99.7%; 69% of all black elementary students in the system were enrolled in these ten schools. There were two all-black junior high schools and two (2) others with 99.7% black enrollments; these four schools enrolled 63% of the entire black junior high population. At that time blacks constituted 56% of the total elementary school population and 58% of the total junior high school population in Chattanooga. At the high school level, the black ratios at the five high schools, as compared to those in September, 1971 were as follows:

	% B—9/23/71	*% B—10/9/72*
Kirkman	25	36
Brainerd	33	45
Chattanooga ...	33	45
Howard	96	95
Riverside	97	95

At that juncture, blacks comprised 59% of Chattanooga's total high school population. Of this total, 59% were enrolled in Howard and Riverside.

On July 20, 1973, the Board moved the district court to permit it to modify its 1971 desegregation plan "because of changed circumstances since said Amended Plan was designed and judicially approved" and for an evidentiary hearing in order to support its claims to a need for modification. Generally, the avowed purpose of the Board's proposed modifications was to achieve "a viable racial mix" in as many schools in the system as possible. As defined by the Board, "a viable racial mix" was having 20 to 40 percent black students and 80 to 60 percent white students in a school within the system, even though the black-white ratio at that time was 59% to 41%. The district court rejected the Board's proposed modification by opinion of November 16, 1973 and order of December 18,

1973. It remarked as follows with respect to the Board's proposal:

> Contending that their experience indicates that schools having more than 35% black student enrollment tend to lose their white student enrollment rather rapidly, the substance of the defendants' proposed plan is to be accomplished by increasing the number of all-black schools or substantially all-black schools. 366 F.Supp. 1257, at 1259.

The Court stated that annexation, not modification of the plan, was the means by which resegregation could be forestalled. In this regard, it observed that the following year "as a consequence of recent annexations, the Chattanooga Public Schools will have an all-time high student enrollment as well as again having a majority of white students." *Id.*, at 1260. In rejecting the Board's proposal, the court stated:

> Furthermore, to maintain its white majority schools, as an inducement for white students not to voluntarily withdraw, it would require year by year adjustment of the plan, presumably *ad infinitum*. Under such a plan, it would appear that the possibility of achieving a unitary school system could never occur until all demographic change ceased, an unlikely event in an urban society where for years the affluence of the City of Chattanooga, like other cities, has been constantly receding to the suburbs. *Ibid.*

The court did, however, grant final approval to the 1971 proposals for desegregation of the high schools, finding that the continued one-race character of Howard and Riverside was the result of conditions beyond the control and responsibility of the Board. It also approved the Board's proposal to assign students from the newly-

annexed areas to over 80% white facilities.[2] And, though no request for such a ruling was made by the parties, the court authorized the Board to effect zone changes "at any time" which were merely administrative, did not increase majority race ratios in any school or involved any annexed areas. Full implementation of the Board's desegregation plan, approved initially in July 1971, was ordered by the court by no later than the commencement of the midyear 1973-1974 school semester.

On December 24, 1973, petitioners filed a motion "to amend the opinion of November 16, 1973 and order filed December 18, 1973 and for a new trial and/or further relief." This motion was itself amended on January 7, 1974. In seeking a new trial and further relief, petitioners contended that the district court erred in ordering implementation of the 1971 plan by the second semester of the 1973-74 academic year. During the over two years between 1971 and 1973 when implementation of most of the plan's provisions for elementary and junior high school desegregation was held in abeyance, significant changes had occurred in the racial composition and configuration of the system that, it was argued, dictated the developing of a totally new desegregation proposal. And the fact that areas of Hamilton County were annexed while full implementation of the 1971 plan was temporarily suspended required, petitioners contended, that any new desegregation plan be drawn with the objective of utilizing these annexed areas to maximize desegregation.

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[2] Between 1971 and 1973, two heavily-white areas were taken into the city from Hamilton County, for many years the source of non-resident tuition students in Chattanooga public schools. For example, during the 1970-71 school year, a total of 620 such students from Hamilton County were enrolled in the five Chattanooga high schools. One area encompassed an existing county school building, a 96% white elementary, and one did not. In total, these areas brought approximately 480 white and 31 black students into the Chattanooga public schools.

On June 20, the district court denied petitioners' motion, as amended, for a new trial and further relief in the following language:

> Turning next to the plaintiff's motion and amended motion for a new trial or for further relief, the Court is of the opinion that the motions are without merit and should be denied. The provisions of the judgment of this Court entered upon August 5, 1971, pursuant to the opinion of the Court set forth at 329 F.Supp. 1374 and affirmed upon appeal at 477 F.2d 851, together with the provisions of the judgment entered upon December 18, 1973, pursuant to the opinion of this Court set forth at 366 F.Supp. 1257 are believed to be sufficient to provide for any necessary or appropriate further supervision by this Court in this case. (App. 4a).

The Court of Appeals' Decisions of October 20, 1975 and January 27, 1976

On October 20, 1975, the Court of Appeals for the Sixth Circuit affirmed by a vote of 2-1 the trial court's orders of December 18, 1973 (denying the Board's motion to modify the 1971 plan) and of June 20, 1974 (denying petitioners' motion for a new trial or further relief). To the extent that the Board or petitioners were asserting that the trial court erred in rejecting their suggestions that the 1971 desegregation plan be revised totally, the majority ruled that such matters had already been resolved by its *en banc* decision in April, 1973 which gave full approval to that plan except insofar as the high schools were concerned. It concluded, therefore, that the sole remaining issue was whether the trial judge erred in giving final approval to the desegregation plan for high schools, only tentatively approved since July, 1971. On that is-

sue, the majority held that the trial court's determination that the continued one-race character of Howard and Riverside Highs "was due to a substantial departure of white students from the public schools in Chattanooga," "beyond control and responsibility of the School Board" was not clearly erroneous (App. 12a). Its conclusion in this regard was articulated as follows:

> Having implemented the plan for desegregating the high schools by establishing zones for attendance which were designed to achieve a high degree of racial balance throughout the system, and having provided further for continuance of a majority-to-minority transfer policy the district judge conceived that he had obeyed the mandate of Brown v. Board [citation omitted] and Swann v. Charlotte-Mecklenburg Board of Education [citation omitted]. So do we. (App. 14a)

In dissent, Judge Edwards rejected the conclusions reached by the majority with respect to the constitutionality of the high school plan in the following terms:

> With all respect for the sincerity of my colleagues, I cannot join the majority opinion, or approve its result. If the majority opinion prevails in this court and in the Supreme Court, it will establish as law the proposition that approximately 60% of the black children in the high schools of the Chattanooga public school system may be continued forever in complete racial segregation in all black schools which were built as such under state law which required a racially dual system and which have been continuously segregated as such down to this very moment. I cannot square this proposition with the great command of the Fourteenth Amendment to provide all American citizens "the equal protection of the laws." (App. 15a).

Judge Edwards observed that the Board's strongest argument for the constitutionality of the high school plan was that 25% white students had been zoned into Howard and Riverside but that white students avoided going by resorting to "white flight". To this assertion he responded as follows:

> As to this measure we have no findings of fact concerning [the Board's] contention. But if we assumed their truth, we clearly would not have exhausted the possibilities for successful desegregation nor satisfied the constitutional command. Many possibilities for desegregation remain, including pairing of white and black schools and high school construction which would make desegregated zones more feasible. In any instance, the defendant school board should be required to propose a new and realistic plan to meet its constitutional duty. (App. 27a)

On January 27, 1976, the Court of Appeals denied petitioners' request that the case be reheard or reheard *en banc*, Judges Edwards and McCree dissenting. Judge Edwards wrote that "there can be no doubt that the two black high schools are racially separate public schools established and maintained by state action and that as to these, there has been no desegregation at all." (App. 29a)

REASONS FOR GRANTING THE WRIT

The Decisions of the Courts Below, Approving Full Implementation of a Desegregation Plan Two Years After It Was Developed Despite Changes In the Racial Composition and Configuration of the School District That Rendered Obsolete Projections That Dismantling of the Dual System Would Occur, Were Premised Upon An Erroneous Reading of This Court's *Swann* Opinion Which Should Not Be Allowed to Stand.

Demographic changes occurring in formerly dual systems between 1954 and 1971 do not lessen the constitutional duty of school boards to act affirmatively to eradicate the vestiges of state-imposed segregation. *Swann* v. *Charlotte Mecklenburg Board of Education*, 402 U.S. 1 (1971) stated in this regard:

> The problems encountered by the district courts and courts of appeals make plain that we should now try to amplify guidelines, however incomplete and imperfect, for the assistance of school authorities and courts. The failure of local authorities to meet their constitutional obligations aggravated the massive problem of converting from the state-enforced discrimination of racially separate school systems. This process has been rendered more difficult by changes since 1954 in the structure and patterns of communities, the growth of student population, movement of families, and other changes, some of which had marked impact on school planning, sometimes neutralizing or negating remedial action before it was fully implemented . . . The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. *Id.*, at 14-15.

Swann teaches, therefore, that the constitutionality of any desegregation plan must be evaluated in light of conditions presently existing in a formerly dual system, not of conditions when *Brown* was decided.

The lower courts acted contrary to this principle in several respects. First, the district court approved implementation in 1974 of a desegregation plan that was developed by the Chattanooga Board in July, 1971 but not effectuated in major respects even as late as the end of the 1972-73 academic year. At the elementary level, the Board's 1971 plan envisioned closing five facilities, pairing sixteen schools, clustering six others and retaining three schools serving grades 1—6. Such an approach, the Board contended, would produce ratios of not less than 30% nor more than 70% of any race in 23 of its 28 elementaries. At junior high level, two schools were to be closed and new zones for the remaining ten would be drawn so that newly restructured elementary school zones would "feed" naturally into them. The Board's proposal for desegregation of the high schools involved establishing four centers—two all-black and two majority white—as zoned academic centers. Zones for these schools would flow naturally from those newly-established for the junior highs. One other high school would serve as an unzoned vocational-technical center, an arrangement that would result in its absorbing numerous vocational-technical courses then being offered in the two black schools. A majority-to-minority transfer provision meeting standards established by this Court in *Swann, supra,* was also included in the Board's proposal.

By the end of the 1972-73 academic year, however, little of the 1971 desegregation plan had advanced beyond the drawingboard. Only four elementaries had been paired, none clustered and one all-black school scheduled for clos-

ing had been kept open. The two junior highs scheduled for closing had been retained. No majority-to-minority transfer provision had been implemented for elementary or junior high students. At high school level, certain vocational-technical courses were still offered at the two black schools which, as in 1971, were virtually all-black. And, though the new zones for the four academic high schools had been established, technically speaking, the resemblance they bore to those described in the 1971 plan was artificial since the new elementary and junior high zones designed to feed into the high school zones had never been established. The system was not constitutionally better at the end of the 1972-73 academic year than in 1971 when the trial court found that the Board had failed to dismantle its dual system. No comprehensive desegregation plan had yet been implemented.

When petitioners suggested in December, 1973 that a new plan was necessary, the trial court should have recognized the fact that it was dealing then with a system that had never taken any meaningful steps to desegregate. Instead, it treated the situation as one in which a terminal desegregation plan which promised to "work realistically" and "work realistically now" had been implemented fully in 1971 but had failed for reasons beyond the control and responsibility of the Board. Therefore, the court reasoned, any attempt on its part to determine whether the 1971 plan offered any reasonable likelihood of achieving the "greatest possible degree of actual desegregation" would require year-by-year adjustments to correct for demographic shifts. That the Board's 1971 projections were based upon data for the system which was obsolete in December, 1973, and the largely-white areas had been annexed by Chattanooga between July, 1971 and December, 1973 (which was not foreseen in 1971) were insufficient

reasons, according to the court, to justify a re-evaluation. In this, the trial court was clearly in error.

Secondly, the court of appeals erred in refusing to consider whether the 1971 plan for elementary and junior highs satisfied constitutional requirements. It stated as follows:

> Both appeals in effect seek to relitigate all of those same issues which we decided in an en banc decision in this Court, reported in *Mapp* v. *Board of Education*, 477 F.2d 851 (6th Cir. 1973), *cert. denied*, 414 U.S. 1022, 94 S.Ct. 445, 38 L.Ed.2d 313 (1973). We there affirmed a final plan of desegregation in all respects except as to the high schools in Chattanooga. (App. 9a)

As with the trial court, the court of appeals' position can be comprehended only by accepting an incorrect premise, i.e., that the 1971 plan for desegregating the elementary and junior high schools had been fully implemented when it was evaluated by the Sixth Circuit in April, 1973. In fact, the plan had not been fully implemented in July, 1973, contrary to the requirements of both *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968) and *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969) that vestiges of dual systems be eradicated "at once". The court of appeals review in early 1973, therefore, could have addressed only the *potential* ability of the 1971 plan to achieve meaningful desegregation at the elementary and junior high levels. In reaching the conclusion that the plan appeared to meet constitutional standards, the court of appeals relied upon fall, 1971 attendance figures and had nothing before it that reflected changes in the racial composition and configuration of the system by April, 1973. Thus, the court of appeals was properly charged with the duty to determine whether the trial court's

decision to order full implementation of the 1971 plan, was constitutionally correct, in the teeth of strong evidence that it would be able to effect no meaningful desegregation in 1974. Had it done so, the court of appeals would have been compelled to find error on the part of the trial court in this regard.

Finally, the court of appeals erred in two respects in considering the constitutionality of the Board's 1971 plan for high school desegregation. It operated on the incorrect assumption that the 1971 provisions had been fully implemented in September, 1971. In fact, vocational-technical courses were still being offered in the two black high schools in June, 1974 when the district court denied petitioners' motion for a new trial or further relief with respect to a new desegregation plan. And it evaluated the high school provisions without giving any consideration whatsoever to the question of how the Board's failure to implement significant portions of its 1971 plan for elementary and junior high schools affected the validity of projections in the plan with respect to the level of desegregation that was to be achieved. The zones and projections for high schools were dependent upon zones for junior highs being properly established, as they, in turn, were dependent upon elementary zones being drawn according to the plan's specifications. Projections of enrollment for the high schools were dependent as well upon the closing of two junior highs; junior high projections were dependent upon the closing of all five elementary schools under the plan. And all projections were linked to the implementation of a majority-to-minority transfer program for students at all levels. Common sense would seem to dictate that when many of the provisions of the plan at the elementary and junior high levels were not implemented as late as 1972-73, Board projections of meaningful high school desegregation lost

all meaning and accuracy. Yet the court of appeals persisted in viewing the high school provisions in a vacuum, as though they could realistically stand irrespective of what had occurred at elementary and junior high levels.

In sum, the lower courts have construed this Court's decision in *Swann, supra,* in a fashion that provides an open invitation for school boards to immunize themselves from effecting any meaningful desegregation by simply developing a plan that appears acceptable on paper while pursuing every tactical advantage to postpone the day when its implementation is actually required. If left uncorrected by this Court, such an interpretation of *Swann* will very likely produce significant erosion of other constitutional standards that have accelerated the desegregation process since 1971.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

Memorandum of the District Court dated June 20, 1974

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TENNESSEE

SOUTHERN DIVISION

Civil Action No. 3564

JAMES JONATHAN MAPP, et al

—VS.—

THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, TENNESSEE, et al

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MEMORANDUM ON PENDING MOTIONS

This lawsuit, involving the desegregation of the public schools of Chattanooga, Tennessee, has been in various stages of litigation since 1960. In the course of that litigation many extensive hearings have been held and many opinions, orders, judgments, appeals and affirmations have entered. The history, nature and extent of the previous litigation herein can be obtained by reference to the previous published opinions in the case. *See Mapp* v. *Board of Education of the City of Chattanooga, Tennessee, aff'd,* 295 F.2d 617 (6th Cir. 1961); 203 F.Supp. 843 (1962), *aff'd,* 319 F.2d 571 (6th Cir. 1963); *aff'd,* 373 F.2d 75 (6th Cir. 1967); 274 F.Supp. 455 (1967); 329 F.Supp. 1374 (1971); 341 F.Supp. 193 (1972), *aff'd en banc,* 477 F.2d

851 (6th Cir. 1973), *cert. denied,* —— U.S. ——, 94 S.Ct. 445, 38 L.Ed.2d 313.

In 1973, during the pendency of the last appeal hereinabove referred to, the defendant school board filed a petition seeking modification of the final plan of school desegregation approved by the Court in 1971. Following further extensive hearings upon that petition, this Court entered its opinion upon November 16, 1973, disposing of all pending issues in the case and directing that a final judgment enter. *See* 366 F.Supp. 1261. A final judgment was accordingly entered upon December 18, 1973.

Since the entry of the above referred to final judgment, the following motions have been filed and are now pending in the case: (1) the plaintiff's motion for allowance of counsel and witness fees (Court File No. 4, Tab No. 161); (2) plaintiff's motion to amend judgment or for further relief (Court File No. 4, Tab No. 166); (3) plaintiff's amended motion to amend judgment and for further relief (Court File No. 4, Tab No. 167); (4) defendant's motion to strike (Court File No. 4, Tab No. 168); (5) motion of third parties to intervene (Court File No. 5, Tab No. 1); (6) response and motion to strike motion to intervene (Court File No. 5, Tab No. 2); and (7) third parties' motion to strike (Court File No. 5, Tab No. 3).

Taking up the pending motions in the sequence filed and turning specifically to the plaintiff's motion to be allowed attorney fees and witness expense, it should be noted that in the Emergency School Act of 1972 the Congress enacted the following statute, codified at 20 U.S.C. § 1617:

> Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with

> any provision of this chapter or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

This statute was recently construed by the United States Supreme Court in the case of *Northcross* v. *Board of Education of Memphis,* —— U.S. ——, 37 L.Ed.2d 48, 92 S.Ct. ——. There the Court held that, in a school desegregation case, the statute required that the successful plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." The plaintiff herein having successfully resisted the defendant's efforts to substantially alter the provisions of the final school desegregation plan previously approved by this Court and affirmed upon appeal, 477 F.2d 851, the plaintiff would be entitled to recover of the defendant a reasonable attorney's fee for legal services rendered in behalf of the plaintiff in all proceedings occurring in this court subsequent to the enactment of 20 U.S.C. § 1617; *Johnson* v. *Combs,* 471 F.2d 84 (5th Cir. 1972); *Thompson* v. *School Board of City of Newport News,* 472 F.2d 177 (4th Cir. 1972), and subsequent to the filing of the defendant's motion for further relief upon July 20, 1973. The plaintiff will be allowed 20 days to file a sworn itemized statement regarding his claim for reimbursement of attorney fees for the period of time hereinabove stated. Likewise, the

plaintiff should include within such sworn statement his claim for witness fees or other costs allowed by the law. Upon the filing of such a sworn statement by the plaintiff, the defendant will be allowed ten days to file objections and/or counteraffidavits thereto, whereupon the Court will make its decision upon these matters.

Turning next to the plaintiff's motion and amended motion for a new trial or for further relief, the Court is of the opinion that the motions are without merit and should be denied. The provisions of the judgment of this Court entered upon August 5, 1971, pursuant to the opinion of the Court set forth at 329 F.Supp. 1374 and affirmed upon appeal at 477 F.2d 851, together with the provisions of the judgment entered upon December 18, 1973, pursuant to the opinion of this Court set forth at 366 F.Supp. 1257 are believed to be sufficient to provide for any necessary or appropriate further supervision by this Court in this case.

Finally, there remains to consider the motion by a citizen group designated as the "Concerned Citizens for Neighborhood Schools, Inc." to be allowed to intervene in the lawsuit. The motion to intervene was filed upon January 25, 1974, more than 30 days after the entry of the final judgment of the Court upon December 18, 1973. The relief sought by the intervenors is a full readjudication of the plan for school desegregation. Having considered the motion to intervene, the Court is of the opinion that it should be disallowed. As noted, the motion to intervene comes after almost 14 years of highly publicized and very extensive litigation. Under the circumstances of this case, the motion to intervene is not timely. *See Robinson* v. *Shelby County Board of Education,* 330 F.Supp. 837 (W.D. Tenn. 1971), *aff'd,* 467 F.2d 1187 (6th Cir. 1972); *United States* v. *Carroll County Board of Education,* 427 F.2d 141 (5th

Cir. 1970). *See also* MOORE'S FEDERAL PRACTICE ¶ 2413[1]; WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1916; "The Requirements of Timeliness Under Rule 24 of the Federal Rules of Civil Procedure" 37 VA. L. REV. 563.

Furthermore, there is nothing in the record or history of this litigation that would indicate any inadequate representation of any relevant viewpoint regarding any issue that has heretofore been before the Court. The Court has no present recollection of any issue resolved in this litigation by agreement or compromise. Rather, every issue throughout the long history of the litigation has been reached only after vigorous and extensive litigation followed by judicial decision and appellate review. The motion to intervene will accordingly be denied.

An order will enter on all pending motions in accordance with this Memorandum.

/s/ FRANK W. WILSON
United States District Judge

Order of District Court dated June 20, 1974

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TENNESSEE,

SOUTHERN DIVISION

Civil Action No. 3564

JAMES JONATHAN MAPP, et al.,

—VS.—

THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, TENNESSEE, et al.

ORDER

This case is before the Court upon the following motions: (1) the plaintiff's motion for allowance of counsel and witness fees (Court File No. 4, Tab No. 161); (2) plaintiff's motion to amend judgment or for further relief (Court File No. 4, Tab No. 166); (3) plaintiff's amended motion to amend judgment and for further relief (Court File No. 4, Tab No. 167); (4) defendant's motion to strike (Court File No. 4, Tab No. 168); (5) motion of third parties to intervene (Court File No. 5, Tab No. 1); (6) response and motion to strike motion to intervene (Court File No. 5, Tab No. 2); and (7) third parties' motion to strike (Court File No. 5, Tab No. 3). The following orders are entered upon the foregoing motions in accordance with the memorandum opinion on pending motions filed herein.

Order of District Court dated June 20, 1974

It is accordingly ORDERED;

(1) That the plaintiffs' motion for the award of counsel and witness fees be sustained and that the plaintiff be allowed 20 days within which to file an affidavit itemizing the said fees and costs pursuant to the opinion of the Court entered herein. The defendant will then be allowed 10 days to file objections or counteraffidavits;

(2) That the plaintiff's motion and amended motion for further relief or new trial are denied; and

(3) That the motion of third parties to intervene herein is denied.

APPROVED FOR ENTRY.

/s/ FRANK W. WILSON
United States District Judge

ATTEST:

A true copy.

Certified this JUN 20 1974

KARL D. SAULPAW, JR., Clerk

By /s/ BERTHA MORGAN
Deputy

Decision of Court of Appeals dated October 20, 1975

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

(Argued April 18, 1975 Decided October 20, 1975.)

Nos. 74-2100, 74-2101

JAMES JONATHAN MAPP et al.,

Plaintiffs-Appellants,

v.

THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, TENNESSEE, et al.,

Defendants-Appellees.

JAMES JONATHAN MAPP et al.,

Plaintiffs-Appellees,

v.

THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, TENNESSEE,

Defendant-Appellant.

BEFORE:

WEICK, EDWARDS and ENGEL,

Circuit Judges.

Decision of Court of Appeals dated October 20, 1975

ENGEL, *Circuit Judge.*

This desegregation case is once more before the court,[1] this time on cross-appeals from an order of the district court entered June 24, 1974. [sic] That order denied motions filed by both parties to modify or amend an earlier order of the court entered December 18, 1973, directed [sic] implementation of the final school desegregation plan previously approved by the court with certain modifications. The December 18, 1973 order provided as well that "[To] the extent the Court has previously given only tentative approval to the High School Zoning Plan, the same is now approved finally."

Both appeals in effect seek to relitigate all of those same issues which we decided in an en banc decision in this court, reported in *Mapp* v. *Board of Education of Chattanooga*, 477 F.2d 851 (6th Cir. 1973), *cert. denied*, 414 U.S. 1022, 94 S.Ct. 445, 38 L.Ed.2d 313 (1973). We there affirmed a final plan of desegregation in all respects except as to the high schools in Chattanooga.

While the district judge had at that time approved the plan as to Kirkman Technical High School, and our affirmance made the same final, District Judge Frank W. Wilson had given only tentative approval to the plan for desegregation for other high schools in the City of Chattanooga, see *Mapp* v. *Board of Education of Chattanooga*, 341 F.Supp. 193 (E.D.Tenn.1972), being uncertain particularly whether three rather than four general purpose high schools would be feasible or desirable in Chattanooga.

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[1] For previous decisions of this court in this litigation see *Mapp* v. *Board of Education of Chattanooga*, 295 F.2d 617 (6th Cir. 1961), 319 F.2d 571 (6th Cir. 1963), 373 F.2d 75 (6th Cir. 1967), 477 F.2d 851 (6th Cir. 1973), *cert. denied* 414 U.S. 1022, 94 S.Ct. 445, 38 L.Ed.2d 313.

With respect to Judge Wilson's refusal to modify the previous final plan of desegregation, we find that he did not abuse his discretion in so doing, particularly since this court has given its approval of that plan.

Accordingly, we see as the sole issue remaining on this appeal the question of whether the district judge erred in ordering final approval of the tentative plan of desegregation for the Chattanooga high schools.

At the time the tentative plan was proposed, it was anticipated that the zoning for the four high schools would produce a racial balance approximately as follows:

	Black Students	White Students
Brainerd High School	32%	68%
Chattanooga High School	44%	56%
Howard High School	75%	25%
Riverside High School	75%	25%

When, however, the plan was placed into effect in the fall of 1971 rather than having the attendance anticipated, the four high schools experienced the following racial balance:

	Black Students	White Students
Brainerd High School	39%	61%
Chattanooga High School	43%	57%
Howard High Schol	99%	1%
Riverside High School	99%	1%

While an actual head count had showed that as late as July 1971 there were 393 (29%) white high school students in the Howard High School zone and 311 (29%) white students in the Riverside zone, only ten reported that September to Howard and three to Riverside.

It is the contention of the plaintiffs that a school board's duty in a previously dual and segregated school system cannot be said to have been performed where, after implementation of a plan of desegregation, such an imbalance in the racial mix of the students yet remains. After taking extensive testimony on this issue and on the other issues raised by the parties' motions to amend the earlier judgment, Judge Wilson, in his Memorandum Opinion of November 16, 1973, made the following findings of fact:

> To the extent that the Court has previously given only tentative approval to the high school zoning plan, final approval will now be given that plan. Two high schools, Howard High School and Riverside High School, have not acquired an enrollment of white students as projected by the Board when the plan was proposed in 1971, but rather have remained substantially all black. It was a concern for the accuracy of these projections that caused the Court to initially give only tentative approval to the high school zoning plan. However, subsequent evidence has now demonstrated that changing demographic conditions within the City and other *de facto* conditions beyond the control and responsibility of the School Board, including the voluntary withdrawal of white students from the system, have become the causative factors for the present racial composition of the student body in those schools and not the original action of the Board in creating segregated schools at these locations. It should be recalled in this connection that the plan previously approved included provision for students to elect to transfer from

a school in which they were in a majority to a school in which they would be in a minority.

While the cause of the departure of white students was disputed, there can be little doubt upon the record that the difference between the anticipated mix and the actual attendance of the high schools when the plan was put into effect was due to a substantial departure of white students from the public schools in Chattanooga, a circumstance which the district judge found to have occurred beyond the control and responsibility of the School Board.

No one who firmly believes in the social and educational value of racial balance in a desegregated school system can help being seriously concerned when such a plan for achieving racial balance does not achieve its objectives on implementation. That such a concern was shared by the district judge is manifest throughout the entire record upon appeal. Nevertheless, the district judge concluded that the demographic changes in the city itself were the cause of the remaining imbalance, a finding which finds support in the record and which we hold is not clearly erroneous.

We are satisfied that, in giving final approval to the high school desegregation plan, Judge Wilson was by no means yielding to irrational concerns over white flight which merely masked inherent Board resistance to integration. To the contrary, he carried out the plan in spite of the apprehended result, and beyond that resisted the defendant Board's further efforts to modify the earlier approved plan for the remainder of the system with this language in his November 27, 1973 [sic] opinion:

"The Court is not unsympathetic to the concern expressed by the Board for minimizing the voluntary

departure of white students from the system. It must be apparent, however, that this objective cannot serve as a limiting factor on the constitutional requirement of equal protection of the laws, nor as a justification for retaining *de jure* segregation. Concern over 'white flight', as the phenomenon was often referred to in the record, cannot become the higher value at the expense of rendering equal protection of the laws the lower value. As stated by the United States Supreme Court in the case of *Monroe* v. *Board of Commissioners,* 391 U.S. 450 [88 S.Ct. 1700, 20 L.Ed.2d 733]. . . . :

'We are frankly told in the Brief that without the transfer option it is apprehended that white students will flee the school system altogether. "But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of the disagreement with them." *Brown II* [*Brown* v. *Board of Education of Topeka II*] [349 U.S. 294] at 300 [75 S.Ct. 753, 99 L.Ed. 1083], . . .

"Moreover, it is the 'effective disestablishment of a dual racially segregated school system' that is required *Wright* v. *Council of City of Emporia,* 407 U.S. 451 [92 S.Ct. 2196, 33 L.Ed.2d 51] . . . not, as seems to be contended by the defendants, the most 'effective' level of voluntarily acceptable 'mixing' of the races." (Footnote omitted)

Having implemented the plan for desegregating the high schools by establishing zones for attendances which were designed to achieve a high degree of racial balance throughout the system, and having provided further for

continuance of a majority-to-minority transfer policy, the district judge conceived that he had obeyed the mandate of *Brown* v. *Board of Education of Topeka II*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955) (*Brown II*) and more particularly of *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971). So do we. Presumably, the district judge might have ordered a further realignment when the first plan did not achieve the proper balance ratio, and yet another if that did not hold. Indeed if such were found to have been required to carry out the constitutional mandate to eliminate the vestiges of a dual system, it would simply have to be done, and we have no doubt the district judge would faithfully have carried out that duty. What he was finally faced with here, however, was rather a more subtle and lingering malaise of fear and bias in the private sector which persisted after curative action had been taken to eliminate the dual system itself. *Swann* v. *Board of Education* recognizes that this latter may be beyond the effective reach of the Equal Protection Clause:

> "Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools."
>
> *Swann* v. *Board of Education, supra*, 402 U.S. at 23, 91 S.Ct. at 1279.

Affirmed.

EDWARDS, *Circuit Judge* (dissenting).

This appeal presents just one significant question: Should we now, under applicable Supreme Court precedent, affirm the District Judge's final order of December 18, 1973, approving a final desegregation order applicable to the Chattanooga high schools?

With all respect for the sincerity of my colleagues, I cannot join the majority opinion, or approve its result. If the majority opinion prevails in this court and in the Supreme Court, it will establish as law the proposition that approximately 60% of the black children in the high schools of the Chattanooga public school system may be continued forever in complete racial segregation in all black schools which were built as such under state law which required a racially dual school system and which have been continuously segregated as such down to this very moment. I cannot square this proposition with the great command of the Fourteenth Amendment to provide all American citizens "the equal protection of the laws."

The rule of this case is all the more significant because the smaller numbers, the maturity, and the greater mobility of high school students tend to make practical accomplishment of high school desegregation the least difficult part of the task mandated by *Brown* v. *Board of Education of Topeka*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954); *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968) and *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971).

The in banc per curiam opinion of the Sixth Circuit (*Mapp* v. *Board of Education of the City of Chattanooga, Tennessee*, 477 F.2d 851 (6th Cir.), *cert. denied*, 414 U.S. 1022, 94 S.Ct. 445, 38 L.Ed.2d 313 (1973)) constituted

unqualified approval of two previously entered opinions and judgments of Judge Wilson, *Mapp* v. *Board of Education of the City of Chattanooga*, 329 F.Supp. 1374 (E.D. Tenn. 1971); *Mapp* v. *Board of Education of the City of Chattanooga*, 341 F.Supp. 193 (E.D.Tenn. 1972). In these two cases Judge Wilson had approved final desegregation orders concerning the grade schools and junior high schools. Equally clearly, he had not approved any final desegregation plan for the high schools. As to the high schools, in his first opinion he said:

High Schools

> During the school year 1970-71, the Chattanooga School System operated five high schools. These included four general curricula high schools and one technical high school. Kirkman Technical High School offers a specialized curricula in the technical and vocational field and is the only school of its kind in the system. It draws its students from all areas of the City and is open to all students in the City on a wholly nondiscriminatory basis pursuant to prior orders of this Court. Last year Kirkman Technical High School had an enrollment of 1,218 students, of which 129 were black and 1,089 were white. The relatively low enrollment of black students was due in part to the fact that Howard High School and Riverside High School, both of which were all-black high schools last year, offered many of the same technical and vocational courses as were offered at Kirkman. Under the defendants' plan these programs will be concentrated at Kirkman with the result that the enrollment at Kirkman is expected to rise to 1,646 students, with a racial

> composition of 45% black students and 55% white students. No issue exists in the case but that Kirkman Technical High School is a specialized school, that it is fully desegregated, and that it is a unitary school.
>
> While some variation in the curricula exists, the remaining four high schools, City High School, Brainerd High School, Howard High School, and Riverside High School, each offer a similar general high school curriculum. At the time when a dual school system was operated by the School Board, City High School and Brainerd High School were operated as white schools and Howard High School and Riverside High School were operated as black schools. At that time the black high schools were zoned, but the white high schools were not. When the dual school system was abolished by order of the Court in 1962, the defendants proposed and the Court approved a freedom of choice plan with regard to the high schools. The plan accomplished some desegregation of the former white high schools, with City having 141 black students out of an enrollment of 1,435 and Brainerd having 184 black students out of an enrollment of 1,344 during the 1970-71 school year. However, both Howard, with an enrollment of 1,313 and Riverside, with an enrollment of 1,057, remained all black. The freedom of choice plan "having failed to undo segregation * * * freedom of choice must be held unacceptable." *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).
>
> The School Board proposes to accomplish a unitary school system within the high schools by zoning the four general curricula high schools with the following results in terms of student ratios:

	Black Students	*White Students*
Brainerd High School	32%	68%
Chattanooga High School	44%	56%
Howard High School	75%	25%
Riverside High School	75%	25%

The plaintiffs have interposed objections to the defendants' high school plan upon the ground that it does not achieve a racial balance in each school. To some extent these objections are based upon matters of educational policy rather than legal requirements. It is of course apparent that the former white high schools, particularly Brainerd High School, remain predominantly white and that the former black high schools remain predominantly black. However, the defendants offer some evidence in support of the burden cast upon them to justify the remaining imbalance. The need for tying the high school zones to feeder junior high schools is part of the defendants' explanation. Residential patterns, natural geographical features, arterial highways, and other factors are also part of the defendants' explanation.

A matter that has given concern to the Court, however, and which the Court feels is not adequately covered in the present record, is the extent to which the statistical data upon which the defendants' plan is based will correspond with actual experience. Among other matters there appears to be substantial unused capacity in one or more of the city high schools. Before the Court can properly evaluate the reliability of the statistical data regarding the high schools, the Court needs to know whether the unused capacity does in fact exist and, if so, where it exists, whether it will

be used and, if so, how it will be used. It would be unfortunate indeed if experience shortly proved the statistical data inadequate and inaccurate and this Court was deprived of the opportunity of considering those matters until on some appellate remand, as occurred in the recent case of *Davis* v. *Board of School Commissioners of Mobile,* 402 U.S. 33, 91 S.Ct. 1289, 28 L.Ed.2d 577.

The plaintiff has submitted a high school plan with high school zones which the plaintiff's witness has testified will achieve a racial balance in each high school. However, this plan is not tied into the junior high school plan hereinabove approved and the Court is unable to say whether it could be so tied in. Furthermore, the same statistical problem discussed above would appear to exist with regard to the plaintiff's plan.

The Court accordingly is unable to give final approval to a high school desegregation plan at this time. Time, however, is a pressing factor. Pre-school activities will commence at each high school within less than a week, if in fact they have not already commenced. Full commencement of the fall term is only one month away. It is clear that the high schools must move at least as far as is proposed in the defendants' high school plan. Accordingly, the Court will give tentative approval only at this time to the defendants' high school plan in order that at least as much as is therein proposed may be placed into operation at the commencement of the September 1971 term of school. Further prompt but orderly judicial proceedings must ensue before the Court can decide upon a final plan for desegregation of the high schools.

In the meanwhile, the defendants will be required to promptly provide the Court with information upon the student capacity of each of the four high schools under discussion, upon the amount of unused space in each of the four high schools, the suitability of such space for use in high school programs, and the proposed use to be made of such space, if any. In this connection the defendants should likewise advise the Court regarding its plan as to tuition students. Last year almost one-third of the total student body at City High School were nonresident tuition paying students. There is no information in the present record as to the extent the Board proposes to admit tuition students nor the effect this might have on the racial composition of the student body. The Court has no disapproval of the admission of tuition students nor to the giving of preference to senior students in this regard, provided that the same does not materially and unfavorably distort the student racial ratios in the respective schools. Otherwise, the matter of admitting tuition students addresses itself solely to the discretion of the Board. No later than the 10th day of enrollment the defendants will provide the Court with actual enrollment data upon each of the four high schools here under discussion.

Mapp v. *Board of Education of the City of Chattanooga, supra* at 1384-86.

In his second opinion he said:

Tentative approval only having heretofore been given to the School Board plan for desegregation of the Chattanooga high schools other than Kirkman

Technical High School (to which final approval has been given). Further consideration must be given to this phase of the plan. At the time that the Court gave its tentative approval to the high school desegregation plan, the Court desired additional information from the Board of Education as to whether three, rather than four, general purpose high schools would be feasible or desirable in Chattanooga. It now appears, and in this both parties are in agreement, that three general purpose high schools rather than four is not feasible or desirable, at least for the present school year. Having resolved this matter to the satisfaction of the Court, the defendant Board of Education will accordingly submit a further report on or before June 15, 1972, in which they either demonstrate that any racial imbalance remaining in the four general purpose high schools is not the result of "present or past discriminatory action on their part" *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. at 26, 91 S.Ct. at 1281, 28 L.Ed.2d 554 at 572, or otherwise, and to the extent that the Board is unable to demonstrate that such racial imbalance which remains is not the result of past or present discriminatory action, they should submit a further plan for removal of all such remaining racial discrimination, the further plan likewise to be submitted on or before June 15, 1972.

Mapp v. *Board of Education of the City of Chattanooga, supra* at 200.

The opinion and order we now review are quite different, and if approved by this Court and the Supreme Court, would represent both a final approval of the school board's current "plan" for operation of the high schools and hold-

ing that the present operation represents desegregation of the previously legally segregated dual high school system.

In the opinion we now review Judge Wilson said:

> The Court is accordingly of the opinion that the defendants have failed to establish either such changed conditions as would render its formerly court-approved plan of school desegregation inadequate or improper to remove "all remaining vestiges of state imposed segregation" or that its newly proposed plan would accomplish that result.
>
> To the extent that the Court has previously given only tentative approval to the high school zoning plan, final approval will now be given that plan. Two high schools, Howard High School and Riverside High School, have not acquired an enrollment of white students as projected by the Board when the plan was proposed in 1971, but rather have remained substantially all black. It was a concern for the accuracy of these projections that caused the Court to initially give only tentative approval to the high school zoning plan. However, subsequent evidence has now demonstrated that changing demographic conditions within the City and other *de facto* conditions beyond the control and responsibility of the School Board, including the voluntary withdrawal of white students from the system, have become the causative factors for the present racial composition of the student body in those schools, and not the original action of the Board in creating segregated schools at these locations. It should be recalled in this connection that the plan previously approved included provision for students to elect to transfer from a school in which they were in a majority to a school in which they would be in a minority.

> *Mapp* v. *Board of Education of the City of Chattanooga*, 366 F.Supp. 1257, 1260-61 (E.D.Tenn.1973).

Thus, clearly, we now have before us the issue as to whether or not in the Chattanooga high schools previous unconstitutional segregation has been eliminated "root and branch." *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

Defendants-appellees accept (as they must) the responsibility of meeting the standard of *Green* v. *County School Board of Kent County, supra:*

> It is against this background that 13 years after *Brown II* commanded the abolition of dual systems we must measure the effectiveness of respondent School Board's "freedom-of-choice" plan to achieve that end.

The School Board contends that it has fully discharged its obligation by adopting a plan by which every student, regardless of race, may "freely" choose the school he will attend. The Board attempts to cast the issue in its broadest form by arguing that its "freedom-of-choice" plan may be faulted only by reading the Fourteenth Amendment as universally requiring "compulsory integration," a reading it insists the wording of the Amendment will not support. But that argument ignores the thrust of *Brown II*. In the light of the command of that case, what is involved here is the question whether the Board has achieved the "racially nondiscriminatory school system" *Brown II* held must be effectuated in order to remedy the established unconstitutional deficiencies of its segregated system. In the context of the state-imposed segregated pattern of long standing, the fact that in 1965 the Board opened

the doors of the former "white" school to Negro children and of the "Negro" school to white children merely begins, not ends, our inquiry whether the Board has taken steps adequate to abolish its dual, segregated system. *Brown II* was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School boards such as the respondent then operating state-compelling dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. See *Cooper* v. *Aaron, supra* [358 U.S. 1] at 7 [78 S.Ct. 1401, 3 L.Ed.2d 5]; *Bradley* v. *School Board,* 382 U.S. 103 [86 S.Ct. 224, 15 L.Ed.2d 187]; cf. *Watson* v. *City of Memphis,* 373 U.S. 526 [83 S.Ct. 1314, 10 L.Ed.2d 529]. The constitutional rights of Negro school children articulated in *Brown I* permit no less than this; and it was to this end that *Brown II* commanded school boards to bend their efforts.[4]

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[4] "We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States,* 380 U.S. 145, 154 [85 S.Ct. 817, 822, 13 L.Ed.2d 709]. Compare the remedies discussed in, *e. g., NLRB* v. *Newport News Shipbuilding & Dry Dock Co.,* 308 U.S. 241 [60 S.Ct. 203, 84 L.Ed. 219]; *United States* v. *Crescent Amusement Co.,* 323 U.S. 173 [65 S.Ct. 254, 89 L.Ed 160]; *Standard Oil Co.* v. *United States,* 221 U.S. 1 [31 S.Ct. 502, 34 L.R.A.,N.S., 834 55 L.Ed. 619]. See also *Griffin* v. *County School Board of Prince Edward County,* 377 U.S. 218, 232-234 [84 S.Ct. 1226, 1233-1235, 12 L.Ed.2d 256].

In determining whether respondent School Board met that command by adopting its "freedom-of-choice" plan, it is relevant that this first step did not come until some 11 years after *Brown I* was decided and 10 years after *Brown II* directed the making of a "prompt and reasonable start." This deliberate perpetuation of the unconstitutional dual system can only have compounded the harm of such a system. Such delays are no longer tolerable, for "the governing constitutional principles no longer bear the imprint of newly enunciated doctrine." *Watson* v. *City of Memphis, supra* [373 U.S.] at 529 [83 S.Ct. [1314] at 1316]; see *Bradley* v. *School Board* [*City of Richmond, Va.*], *supra; Rogers* v. *Paul,* 382 U.S. 198 [86 S.Ct. 358, 15 L.Ed.2d 265]. Moreover, a plan that at this late date fails to provide a meaningful assurance of prompt and effective disestablishment of a dual system is also intolerable. "The time for mere 'deliberate speed' has run out," *Griffin* v. *County School Board* [*of Prince Edward County*], 377 U.S. 218, 234 [84 S.Ct. 1226, 1235, 12 L.Ed.2d 256], "the context in which we must interpret and apply this language [of *Brown II*] to plans for desegregation has been significantly altered." *Goss* v. *Board of Education* [*of City of Knoxville, Tenn.*], 373 U.S. 683, 689 [83 S.Ct. 1405, 1409, 10 L.Ed.2d 632]. See *Calhoun* v. *Latimer,* 377 U.S. 263 [84 S.Ct. 1235, 12 L.Ed.2d 288]. The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now.*

Green v. *County School Board of New Kent County, supra* at 437-39, 88 S.Ct. at 1693.

At the outset we note that we deal with a school district which at the time of the beginning of this litigation was clearly and concededly a dual school system segregated by race according to state statute. We therefore are required to determine whether or not a public high school system (racially constituted during the 1973-74 school year as follows) can be held by this court to have been desegregated "root and branch":

	White	Black	% White	% Black
Howard	10	999	1	99
Riverside	3	721	1	99
Chattanooga	439	330	57	43
Brainerd	646	404	61	39

There can, of course, be no doubt that Howard and Riverside High Schools are "racially separate public schools established and maintained by state action." *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 5, 91 S.Ct. 1267, 1271, 28 L.Ed.2d 554 (1971). Both were built as Negro schools under state law which required a dual school system. T.C.A. §§ 2377, 2393.9 (Williams 1934). Twenty-one years after decision of *Brown* v. *Board of Education of Topeka,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), both high schools (encompassing 60% of the black high school population of Chattanooga) are still (and always have been) essentially 100% black. As to these schools and students, there has been no desegregation at all.

Defendants-appellees contend that two measures which they took should be accepted as the equivalent of desegregation. They are: 1) the inauguration of a freedom of choice plan, and 2) a change in zone boundaries which

was calculated (it is claimed) to introduce 25% of white students into both high schools. Defendants-appellees freely admit that neither measure was effective in changing the segregated character of the Howard and Riverside High Schools.

As to the freedom of choice plans, the Supreme Court has repeatedly held that ineffective freedom of choice plans are not a substitute for desegregation in fact. *See Green* v. *County School Board of New Kent County, supra; Monroe* v. *Board of Commissioners of the City of Jackson,* 391 U.S. 450, 88 S.Ct. 1700, 20 L.Ed.2d 733 (1968).

Defendants-appellees' strongest reliance is upon the second contention that they "zoned" 25% white students into Howard and Riverside but that the white students thus assigned avoided the assignment by "white-flight." As to this measure, we have no findings of fact concerning defendants-appellees' contention. But if we assumed their truth, we clearly would not have exhausted the possibilities for successful desegregation nor satisfied the constitutional command. Many possibilities for desegregation remain, including pairing of white and black schools and high school construction which would make desegregated zones more feasible. In any instance, the defendant school board should be required to propose a new and realistic plan to meet its constitutional duty. *See Swann* v. *Charlotte-Mecklenburg Board of Education, supra,* 402 U.S. at 15-21, 91 S.Ct. 1267; *Brinkman* v. *Gilligan,* 518 F.2d 853 (6th Cir. 1975).

In my judgment the case should be affirmed as to the grade schools and junior high schools. The judgment should be vacated and remanded as to the high schools. All other issues presented by either party should be summarily denied.

Order of Court of Appeals dated January 27, 1976

UNITED STATES COURT OF APPEALS

SIXTH CIRCUIT

Jan. 27, 1976.

No. 74-2100.

JAMES JONATHAN MAPP, et al.,

Plaintiffs-Appellants,

v.

THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, et al.,

Defendant-Appellees.

Before:

WEICK, EDWARDS and ENGEL,

Circuit Judges.

ORDER

This cause, 6 Cir., 525 F.2d 169, came on for hearing on the petition for rehearing with a suggestion that it be reheard en banc.

Judges Edwards and McCree having requested en banc rehearing for the reasons set forth in Judge Edwards' dissenting opinion, but it appearing to the court that less than a majority of the court has voted in favor thereof, the petition for rehearing was referred to the panel which originally heard the appeal and was determined not to be well taken, Judge Edwards dissenting.

Order of Court of Appeals dated January 27, 1976

It is therefore ordered that the petition for rehearing be denied.

EDWARDS, Circuit Judge (dissenting).

Although the Board of Education of the City of Chattanooga has at long last, under orders of the Supreme Court of the United States, this court, and the United States District Court, proceeded to bring both its grade schools and junior high schools into compliance with the Constitution of the United States, as to two of its high schools it has signally failed to do so. The majority opinion of this court would establish as law the proposition that approximately 60% of the black children of the Chattanooga high school system may be continued forever in complete segregation in all-black high schools. The two black high schools at issue were built as such under state law that required a racially dual school system and have been continuously segregated as such down to this very moment.

There can be no doubt that the two black high schools are racially separate public schools established and maintained by state action and that as to these schools there has been no desegregation at all. In my judgment it simply cannot be said with any accuracy that the possibilities for successful desegregation have been exhausted. As to these schools the School Board should be required to propose a new and realistic and effective plan to meet its constitutional duty.

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

No. 75-1564

JAMES JONATHAN MAPP, et al.,

Petitioners,

vs.

THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, TENNESSEE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondent accepts Petitioners' statement of jurisdiction but cannot accept their statement of the question presented or the statement of the case.

COUNTER STATEMENT OF THE QUESTIONS PRESENTED

The questions presented which were correctly resolved by the District Court and the Appellate Court are whether a formerly de jure dual school system is under a continuing annual responsibility to assign its white children throughout the school system in such a manner as to avoid having any schools with a racial balance disproportionate to the system-wide racial balance where such racial disproportion as may then exist in the system "is not the result of any present

or past discrimination upon the part of the Board or other state agency," but "rather is a consequence of demographic and other factors not within any reasonable responsibility of the Board."[1] The District Court and the Court of Appeals answer was in the negative and should be affirmed by a denial of the Petitioners' petition for a writ of certiorari.

The second issue correctly decided by the District Court and the Appellate Court is as follows: whether once a de jure school system has implemented a desegregation plan, as approved by the District Court and the Court of Appeals, with petition having been denied by the United States Supreme Court, is there any Constitutional requirement that additional white students received into the school system through annexation subsequent to the District Court order be dispersed throughout the system in order to achieve a racial balance system-wide? Both the District Court and the Court of Appeals answered this question in the negative and should be affirmed by this court's denial of the Petitioners' petition for writ of certiorari.

The October 20, 1975 2-1 decision of the Court of Appeals affirms the District Court without any qualifications. A petition for rehearing and a suggestion of a rehearing en banc in said case was denied by the Court of Appeals on January 27, 1976. A copy of said opinions appears as *Appendix A* to this brief in opposition.

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[1] *Mapp* v. *Board of Education of Chattanooga*, 329 F.Supp. 1374, 1384 (aff'd 477 F.2d 851) (6th Cir. 1973), cert. denied, 414 U.S. 1022 (1973). As to the Junior High Schools the District Court said:

> "Rather, such limited *racial imbalance* as may remain is the consequence of demographical, residential, or other factors which in no reasonable sense could be attributed to School Board action or *inaction*, past or present, nor to that of any other state agency. The Court is accordingly of the opinion that the defendants' plan for desegregation of the Chattanooga Junior High Schools will eliminate 'all vestiges of state imposed segregation' as required by the *Swann* decision." (Emphasis added)

STATEMENT OF THE CASE

The Action Under Review Here

This petition seeks to review a judgment of the District Court in a school desegregation case affirmed by the United States Court of Appeals for the Sixth Circuit, where the District Court refused to order the submission of a new desegregation plan when two high schools remained substantially all-black in spite of affirmative efforts by the Chattanooga Board of Education (hereinafter referred to as CBE) to desegregate said schools and where subsequent and proposed territorial annexation would appear to provide additional white students in the system. Such is the essence of respondent's appeal, Case No. 74-2100, and the Court of Appeals affirmed.

All of the testimony with reference to the subsequent and proposed annexation was introduced by the Petitioners in rebuttal and response to a motion for further relief by CBE requesting amendment of the Amended Desegregation Plan of June 16, 1971. The motion of CBE was the reason for the evidentiary hearing in October of 1973.

The District Court's opinion also refused to allow CBE to amend a previously approved desegregation plan involving decisions based upon race, contiguous busing, pairing, clustering, and racial gerrymandering of zones. The limited amendment was sought by respondent (CBE) in order to receive the Court's permission to implement changes in the desegregation plan designed to diminish the white withdrawal from the system. The Court of Appeals affirmed the District Court, No. 74-2101.

Factual Background

On July 22, 1955, respondent issued its initial statement of policy in response to the decisions of this Court in *Brown* v. *Board of Education of Topeka I*, 347 U.S. 483, and *Brown II*, 349 U.S. 295, decided on May 17, 1954 and May 31, 1954, respectively, on the subject of student desegregation in public

schools. The opening paragraph of said statement read as follows:

> "The Chattanooga Board of Education will comply with the decision of the United States Supreme Court on the matter of integration in the public schools."[2]

The Board immediately undertook a process of elucidation with the formation of an interracial advisory committee.[3]

The elucidation process was continued until this litigation was filed on April 6, 1960. A gradual desegregation plan was approved in 1962 with 16 selected elementary schools being desegregated in September of that year in grades one, two, and three. All dual zones would have been abolished by 1968. At that point in time all parties presumed such to be compliance with the Constitution.

The pace of the desegregation was accelerated pursuant to District Court order following a motion for further relief by plaintiffs, filed March 29, 1965. The complete elimination of dual zones in all grades was effected by December, 1966. Subsequent to affirmance by the Court of Appeals,[4] the only issue remaining was that of faculty assignments until February of 1971 when the District Court dismissed a motion by Petitioners for summary judgment, but set an evidentiary hearing classifying the issues for trial and placing the burden of proof upon Respondent to prove that the actions taken by Respondent met the obligation to establish a unitary school system.

Shortly after this Court's opinion in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (4/20/71) in May, the evidentiary hearing was completed and a new desegregation plan was ordered to "maximize integration" re-

[2] The complete text of this statement appears as *Appendix C* in a petition filed by CBE with this Court on January 29, 1975, No. 75-1077.

[3] Said statement appears as *Appendix D* in petition No. 75-1077.

[4] 373 F.2d 75 (1967).

quiring for the first time decisions based upon race for the purpose of achieving an adequate constitutional remedy.[5]

Initial and partial implementation of the 1971 desegregation plan began in September of 1971 under the supervision of the District Court.

Petitioners took an appeal from this decision on the basis that the deviations from a racial balance in the approved plan were unacceptable and unconstitutional. A cross appeal was taken by CBE contending that remedial measures permitted by this Court in *Swann* were permissible, not required, and only in a school system found to be in default of its constitutional obligation; and that CBE was not in default. CBE further contended that the District Court opinion in its reference to maximizing integration read the racial balance language in *Swann* as being constitutionally mandatory and not merely "a starting point."

In a 2-1 Appellate Court decision rendered on October 11, 1972 the case was remanded to the District Court. Following a motion for rehearing and suggestion of rehearing en banc by petitioners, a rehearing en banc was granted with oral argument taking place on December 14, 1972. On April 30, 1973, 477 F.2d 851, an en banc decision of the Court of Appeals reversed the 2-1 decision and affirmed the District Court's opinion.[6]

In the summer of 1973 and as a result of the experience of two years under the amended desegregation plan, CBE, having experienced substantial withdrawal of white students from the system, conducted a careful evaluation of the system and particularly the possible causes of the withdrawal from the schools. The 1971 amended desegregation plan had not been fully implemented in the elementary and junior high schools

[5] 329 F.Supp. 1374 (1971).

[6] 477 F.2d 851, with Judges Weick and O'Sullivan dissenting and with a separate concurrence by Judge Miller.

during the two years experience under examination. CBE also made a projection of the possible impact upon the system of additional busing projected for full implementation of the plan. Recognizing the possible constitutional obligation upon a board to avoid inaction which might later be alleged to have contributed to student resegregation, CBE, on July 20, 1973, filed a Motion for Further Relief: to Adjust Amended Plan of Desegregation, as filed June 16, 1971. An extended evidentiary hearing was held in Octber of 1973 in which the actual experience of CBE in September of 1971, September 1972, and September 1973 was presented to the District Court, as well as CBE's plan for attempting to counter the white student withdrawal as reflected by the statistical data for the three years in question.

In rebuttal, Petitioners offered testimony with reference to the probable impact of the completion of annexation (then imminent) of certain areas contiguous to the Chattanooga system with said areas being populated predominately by white students.

CBE's motion to amend the plan was denied in an opinion entered on November 16, 1973. Such opinion provided specific guidelines to CBE as to the creation of zones with reference to annexed schools, the adjustment of zones within the system, and further providing that any such creation or adjustment of zones would be required to be submitted to the federal court 30 days prior to their effective date.

On December 26, 1973, Petitioners filed a motion to amend the memorandum opinion of November 16, 1973 and for a new trial and further relief. Said motion was supplemented with an amendment on January 7, 1974. Said motion was denied by the District Court on June 20, 1974 and subsequent thereto on July 12, 1974 Petitioners filed a notice of appeal requesting a complete new desegregation plan for the Chattanooga system. Subsequent thereto on July 22, CBE filed a cross appeal with reference to the District Court's denial of its

motion to amend the plan. Both cases were docketed in the Appellate Court on September 30, 1974.[7]

The appellate oral argument was held on April 18, 1975 resulting in a 2-1 decision affirming the District Court without qualifications, said opinion being filed on October 20, 1975.[8] Thereafter, the Petitioners filed "Motion for Rehearing or Rehearing en banc" on November 4, 1975 followed by an "Amended Petition for Rehearing and Suggestion of Rehearing en banc" on November 21, 1975, pursuant to a grant of extension in time in which to file said amendment, having been noted on November 4, 1975.

In the interim between the filing of the original motion for rehearing and the filing of the petition for rehearing, this Court granted certiorari in the case of *Pasadena City Board of Education, et al.* v. *Nancy Anne Spangler, et al.* and *United States of America*, No. 75-164, on November 11, 1975.

In the amended petition of November 21, 1975 Petitioners brought to the attention of the Court of Appeals the second question presented in the petition for writ of certiorari filed on behalf of the Pasadena City Board of Education which read as follows:

> "2) Is a school system required to amend its judicially validated desegregation plan to accommodate for annual demographic changes for which it is in no way responsible? Id., at 3271."

The Petitioners went on to suggest that this Court's decision in *Spangler* might clarify the language of *Swann* with respect to the need for "year to year adjustments" and provide guidance to the Court of Appeals in re-evaluating its decision in the *Chattanooga* case. In the conclusion to their petition of No-

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[7] For a more complete statement of the facts from July, 1955 forward, see *Appendix E* to CBE's petition before this Court, No. 75-1077.

[8] Pages 8(a) through 27(a) inclusive in Petitioners' Appendix and pages 1(a) through 17(a) of Respondent's petition in No. 75-1077.

vember 21, 1975, Petitioners went on to request that any action upon their motion for rehearing be stayed, pending this Court's decision in *Spangler, supra.*

Upon receiving notification on November 11, 1975 of the action of this Court in granting certiorari in *Spangler,* CBE's counsel requested and received a copy of the petition for writ of certiorari as filed on behalf of the Pasadena School Board. Following an analysis of this petition, CBE sought and received permission from counsel in the *Spangler* case to file an amicus curiae brief in that case. The brief was filed in the last week of December 1975.

On January 27, 1976 an order by the Appellate Court was filed denying Petitioners' petition for a rehearing.[9]

The next day, Wednesday, January 28, 1976, a petition by CBE seeking a writ of certiorari to review the judgment of the United States District Court, Eastern District of Tennessee, Southern Division, made and entered into this case pursuant to the memorandum opinion of November 16, 1973, and/or the affirmance of said opinion of the District Court affirmed by the United States District Court of Appeals for the Sixth Circuit on October 20, 1975, was placed in the mail from Cincinnati, Ohio directed to the Clerk of the United States Supreme Court.

On the following day, Thursday, January 29, CBE received in the United States mail its first notice of the action of the United States Court of Appeals for the Sixth Circuit in the form of a copy of an order denying the petition for rehearing of plaintiffs-appellants, James Jonathan Mapp, et al, in No. 74-2100, as filed on Tuesday, January 27. Said petition by CBE was received and filed by the Clerk of this Court on Friday, January 30.

Petitioners herein did not respond to said petition by CBE. On Saturday, April 17, 1976, counsel for CBE received a copy of a letter addressed to counsel for Petitioners herein from the clerk of this court dated April 14, 1976, indicating this Court's

[9] Pages 28(a), 29(a) Petitioners' Appendix, and pages 18a, 19a of Respondent's Appendix hereto.

request that Petitioners herein respond to the January 30, 1976 petition by CBE, No. 75-1077.

Subsequent thereto on Monday, April 26, 1976, this petition was filed with the Clerk of this Court and counsel for CBE received a copy thereof on April 28, 1976.

There are numerous inaccuracies reflected in the statement of the case by Petitioners. Illustrative is the reference on page three referring to the District Court order of February 4, 1972 approving the Board's plan to establish a system-wide vocational technical high school. The record will indicate that CBE has maintained a system-wide vocational technical high school since 1966. In fact, counsel for Petitioners excluded consideration of the Kirkman Technical School from the scope of the desegregation plan by a statement in open court during the initial part of the hearing in 1971.

The initial appeal from the decision of November 16, 1973 was that of the Petitioners after the District Court Judge denied their motion to amend said order and for a new trial and/or further relief. It was subsequent to and as a result of this action by Petitioners that the decision was made by CBE to cross appeal from that part of the District Court opinion denying their request for permission to amend its plan.

A further inaccuracy is reflected on page six where it is indicated that the four high schools would be "utilized fully for academic programs." All of the high schools have other than academic programs and the change was to make the programs in all four high schools substantially similar with regard to their educational content including the nonacademic area.

In 1971 the Board's projections with reference to the affirmative action to desegregate Riverside and Howard were in no part dependent upon current proposals for elementary and junior high school facilities. The initial projections were based upon students actually in the 9th grade, the 10th grade, and the 11th grade in the zones as redrawn at the direction of the Court.

An examination of *Exhibit B* would indicate that the following references on page seven were inaccurate:

> "Since the plan was not implemented in any meaningful sense in September 1971, . . ."
>
> "No implementation of elementary provisions of the Board's 1971 plan had occurred by the start of the 1972-73 academic year."

On page nine and ten the Petitioners state:

> "It also approved the Board's proposal to assign students from the newly annexed areas to over 80% white facilities."

The proposal to the District Court by CBE in October 1973 did not include any proposals with reference to student assignment in newly annexed areas subsequent to the hearing.

REASONS FOR DENYING THE WRIT

Certiorari should be denied because the decision of the Court of Appeals is consistent completely with applicable decisions of this Court in *Brown I* and *II* and its progeny, particularly *Swann*.

Demographic changes and other changes within a school system, subsequent to district court approval of an amended plan of desegregation, when not caused either directly or indirectly by such school system's action or inaction, have no relevance to the affirmative desegregation constitutional duty of the school system even though undesirable racial proportions in schools in the system are the result.

The argument of the Petitioners ignores cause. They construe the constitution to require a school board to act affirmatively to eradicate racial segregation no matter what caused the racial segregation; and when their own statement of their interpretation of the Constitution is limited to "state-imposed segregation."[10]

[10] Petition, p. 14.

And further as primary support for such a constitutional conclusion, Petitioners proceed immediately to quote from this Court's opinion in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). Such quotation utilizes "state-enforced discrimination" and "state-imposed segregation" indicating with unquestioned clarity that this Court was not in any manner directing its attention to racial segregation caused by other than state action.

If the Petitioners' constitutional interpretation is accepted, all of the states of the Union must then assume, as a constitutional duty, the affirmative obligation to act to remove all racial segregation which may exist in the future, without any consideration of cause. This Court has not so construed the Fourteenth Amendment. *Brown I* and *II* were concerned solely with complete school segregation created solely by the state.[11]

Mr. Justice Brennan's unanimous opinion in *Green* v. *County School Board of New Kent County, Virginia*, 391 U.S. 430 (1968), the repeated references to "state-imposed segregation" made it clear that this Court was not addressing its attention to racial segregation no matter what its cause.[12] *Swann, supra,*

[11] "In each instance they have been denied admission to schools attended by white children under laws *requiring* or permitting segregation according to race." *Brown I*, pp. 487-8. (Emphasis added)

[12] *Green, supra,* included the following:

". . . the State acting through the local school board and school officials, organized and operated a dual system, . . ." page 435.

". . . in the context of the State-imposed segregated pattern . . ." page 432.

". . . then operating State-compelled dual systems . . ." page 432.

". . . toward disestablishing State-imposed segregation." page 439.

". . . for dismantling the State-imposed dual system . . ." page 439.

". . . and the Court should retain jurisdiction until it is clear that State-imposed segregation has been completely removed." page 439.

"A desegregation program to effectuate conversion of a State-imposed dual system to a unitary, non-racial system . . ." page 441.

was completely consistent with this constitutional concept re-enforcing it with eight or more direct references, in a manner such as to permit no suggestion of ambiguity.[13]

Petitioners' theory is then supported by wholly inaccurate references to the racial changes since 1971 in an effort to convince this Court that defendant CBE has somehow misled the District Court and the Appellate Court by submitting a paper plan and then failing to implement such plan.

The pace and the scope of racial desegregation in the Chattanooga School System (CSS) is reflected in the eight pages of *Exhibit B* to this opposition brief. Such is only a minute portion of the statistical facts submitted to the District Court during the evidentiary hearing in October of 1973.[14]

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[13] "We granted certiorari in this case to review important issues as to the duties of school authorities and the scope of powers of Federal Courts under this Court's mandates to eliminate racially separate schools *established and maintained by state action.*" (Emphasis added) *Swann*, supra, p. 5.

". . . state-imposed segregation by race in public schools denies equal protection of the laws." p. 11

". . . where dual school systems had historically been maintained by operation of state laws." Such is followed by a quote from *Green* which includes the term 'state-imposed segregation.' p. 13

". . . the massive problem of converting from the state-enforced discrimination . . ." p. 14

". . . to eliminate from the public schools all vestiges of state-imposed segregation . . ." p. 15

". . . the responsibilities of school authorities in desegregating a state-enforced dual school system . . ." p. 18

". . . a potent weapon for creating or maintaining a state-segregated school system . . ." p. 21

[14] Exhibit No. 3, Book entitled, "Chattanooga Public Schools, Chattanooga, Tennessee, Attendance Zones. Pupil Enrollment Data, Part III, Summary Analysis of Enrollment Experience, Black-White Ratio Stability" introduced as evidence (with a copy handed to local counsel, Mr. Williams) on October 3, 1973, Volume I, page 148 of the trial transcript. Such data was prepared from school system summary reports Form OS/CR 102, entitled "Elementary and Secondary School Civil Rights Survey" filed each year by CBE as required under Title VI of the Civil Rights Act of 1964, U.S. Department of Health, Education and Welfare, Office of Civil Rights, Washington, D. C.

Petitioners represent to this Court (p. 15) that "By the end of the 1972-73 academic year, however, little of the 1971 desegregation plan had advanced beyond the drawing board." (It should be remembered that dual zones had been entirely disestablished in this system in 1966.) Twenty-three (23) of the twenty-nine (29) elementary schools were then desegregated. One all-black elementary school, Avondale, had shifted from all-white in 1962-63, to all-black in 1971-72 *without any action* upon the part of CBE. Bell, Donaldson, Pineville, Piney Woods, and Trotter had not been desegregated because of the lack of transportation needed to implement the 1971 amended plan. East Lake, Highland Park, Howard, Normal Park, Orchard Knob, Pineville and Smith were not substantially desegregated because of the same reason. However, such implementation was ordered by the District Court's opinion of November 16, 1973, which is the subject of this appeal. Since such final compliance transpired subsequent to the October 1973 hearing, these facts are not in the record on appeal as it was fully implemented in January-February of 1974. The statistical and other evidence of such implementation is now a part of the District Court record as an exhibit to an affidavit of the School Superintendent, Dr. James W. Henry, filed on August 2, 1974. Such facts were made available to the Court of Appeals prior to or during the oral argument of April 18, 1975.

The tone and detail of the Petitioners' argument is designed to convince this Court that CBE has somehow hoodwinked both the District and the Appellate Court. The facts reflected in *Exhibit B* considered alone negate any such conclusion or inference. The respondent suggests that judicial notice of these facts is necessary for the Court's evaluation of factual inaccuracies which appear throughout the petition.

In the first full paragraph on page 16, the petition com-

plains that the action of the District Court Judge characterizes "the situation as one in which a . . . plan . . . had been implemented fully . . ." The record is that the District Court in 1973 ordered full implementation of the elementary and junior high schools but recognized that the high school part of the plan had been fully implemented by the introduction of zoning at the high school level.[15] Freedom of choice for the high schools only had been in effect since 1966 since the dual zones had been abolished. The three formerly all-white high schools had been substantially desegregated voluntarily by 1971. (See *Exhibit B*, p. 27a).

The dissent at the Appellate level confirms the above analysis with reference to elementary and junior high schools with the opening sentence of his dissent from the denial of the petition to rehear:

> "Although the Board of Education of the City of Chattanooga has at long last, under orders of the Supreme Court, and the United States District Court, proceeded *to bring its grade schools and junior high schools into compliance with the Constitution of the United States,* as to two of its high schools it has signally failed to do so." (emphasis added)

Petitioners confusion is further reflected on page 18 where it states that the Court of Appeals, ". . . operated on the incorrect assumption that the 1971 (high school) provisions had been fully implemented in September of 1971." Such was a fact, and not an incorrect assumption, evident from the record, not challenged in the trial court.[16] The plan did not

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[15] *Mapp* v. *Board of Education*, 366 F.Supp. 1257 (1973) p. 1261:

> "It further appears from the testimony given upon the recent trial of this cause that the defendants are prepared to promptly effect implementation of the final school desegregation plan herein approved. Such implementation shall be effected no later than the commencement of the midyear school semester."

[16] p. 27a of *Appendix B*, hereto.

produce its desired result as to high schools, but such was not due to failure to implement, but for other reasons beyond the control of CBE and so found to be a fact by the District Court; a fact found by the Court of Appeals not to be clearly erroneous.[17]

The allegation that CBE has immunized its system "from effecting any meaningful desegregation" is in stark contrast to the results. So is the charge that it pursued "every tactical advantage to postpone the day when its implementation is actually required." (p. 19)

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[17] pp. 5a, 6a of Appendix A hereto:

> Having implemented the plan for desegregating the high schools by establishing zones for attendances which were designed to achieve a high degree of racial balance throughout the system, and having provided further for continuance of a majority-to-minority transfer policy, the district judge conceived that he had obeyed the mandate of *Brown* v. *Board of Education of Topeka II*, 349 U.S. 294 (1955) (*Brown II*) and more particularly of *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). So do we. Presumably, the district judge might have ordered a further realignment when the first plan did not achieve the proper balance ratio, and yet another if that did not hold. Indeed if such were found to have been required to carry out the constitutional mandate to eliminate the vestiges of a dual system, it would simply have to be done, and we have no doubt the district judge would faithfully have carried out that duty. What he was finally faced with here, however, was rather a more subtle and lingering malaise of fear and bias in the private sector which persisted after curative action had been taken to eliminate the dual system itself. *Swann* v. *Board of Education* recognizes that this latter may be beyond the effective reach of the Equal Protection Clause:
>
> > "Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disportionate racial concentrations in some schools."
> >
> > *Swann* v. *Board of Education, supra*, 402 U.S. at 23

CONCLUSION

For the foregoing reasons it is respectfully submitted: (1) that the petition should be denied and that a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should not issue in case No. 74-2100, Petitioners' appeal to the Appellate Court; and (2) as the petition by CBE to this Court, No. 75-1077, requests an affirmance of the Appellate Court decision and that of the District Court, that the petition of CBE No. 75-1077, also be denied, including No. 74-2101.

Respectfully submitted,

WITT, GAITHER, RICHARDSON, HENNISS & WHITAKER

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Date: May 13, 1976

APPENDIX A

Nos. 74-2100 and 74-2101

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES JONATHAN MAPP, et al., *Plaintiffs-Appellants* (74-2100), *Plaintiffs-Appellees* (74-2101), v. THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, TENNESSEE, et al., *Defendants-Appellees* (74-2100), *Defendants-Appellants* (74-2101).	APPEAL from the United States District Court for the Eastern District of Tennessee.

Decided and Filed October 20, 1975.

Before: WEICK, EDWARDS and ENGEL, Circuit Judges.

ENGEL, Circuit Judge, delivered the opinion of the Court in which WEICK, Circuit Judge, joined. EDWARDS, Circuit Judge (pp. 7a-17a), delivered a separate dissenting opinion.

ENGEL, Circuit Judge. This desegregation case is once more before the court,[1] this time on cross-appeals from an order of the district court entered June 24, 1974. That order denied motions filed by both parties to modify or amend an earlier order of the court entered December 18, 1973, directed imple-

[1] For previous decisions of this court in this litigation see *Mapp* v. *Board of Education of Chattanooga*, 295 F. 2d 617 (6th Cir. 1961), 319 F. 2d 571 (6th Cir. 1963), 373 F. 2d 75 (6th Cir. 1967), 477 F. 2d 851 (6th Cir. 1973), *cert. denied* 414 U.S. 1022.

mentation of the final school desegregation plan previously approved by the court with certain modifications. The December 18, 1973 order provided as well that "[To] the extent the Court has previously given only tentative approval to the High School Zoning Plan, the same is now approved finally."

Both appeals in effect seek to relitigate all of those same issues which we decided in an en banc decision in this court, reported in *Mapp* v. *Board of Education of Chattanooga*, 477 F. 2d 851 (6th Cir. 1973), *cert. denied*, 414 U.S. 1022 (1973). We there affirmed a final plan of desegregation in all respects except as to the high schools in Chattanooga.

While the district judge had at that time approved the plan as to Kirkman Technical High School, and our affirmance made the same final, District Judge Frank W. Wilson had given only tentative approval to the plan for desegregation for other high schools in the City of Chattanooga, see *Mapp* v. *Board of Education of Chattanooga*, 341 F. Supp. 193 (E.D. Tenn. 1972), being uncertain particularly whether three rather than four general purpose high schools would be feasible or desirable in Chattanooga.

With respect to Judge Wilson's refusal to modify the previous final plan of desegregation, we find that he did not abuse his discretion in so doing, particularly since this court has given its approval of that plan.

Accordingly, we see as the sole issue remaining on this appeal the question of whether the district judge erred in ordering final approval of the tentative plan of desegregation for the Chattanooga high schools.

At the time the tentative plan was proposed, it was anticipated that the zoning for the four high schools would produce a racial balance approximately as follows:

	Black Students	White Students
Brainerd High School	32%	68%
Chattanooga High School	44%	56%
Howard High School	75%	25%
Riverside High School	75%	25%

When, however, the plan was placed into effect in the fall of 1971 rather than having the attendance anticipated, the four high schools experienced the following racial balance:

	Black Students	White Students
Brainerd High School	39%	61%
Chattanooga High School	43%	57%
Howard High School	99%	1%
Riverside High School	99%	1%

While an actual head count had showed that as late as July 1971 there were 393 (29%) white high school students in the Howard High School zone and 311 (29%) white students in the Riverside zone, only ten reported that September to Howard and three to Riverside.

It is the contention of the plaintiffs that a school board's duty in a previously dual and segregated school system cannot be said to have been performed where, after implementation of a plan of desegregation, such an imbalance in the racial mix of the students yet remains. After taking extensive testimony on this issue and on the other issues raised by the parties' motions to amend the earlier judgment, Judge Wilson, in his Memorandum Opinion of November 16, 1973, made the following findings of fact:

> To the extent that the Court has previously given only tentative approval to the high school zoning plan, final approval will now be given that plan. Two high schools, Howard High School and Riverside High School, have not acquired an enrollment of white students as projected by the Board when the plan was proposed in 1971, but rather have remained substantially all black. It was a concern for the accuracy of these projections that caused the Court to initially give only tentative approval to the high school zoning plan. However, subsequent evidence has now demonstrated that changing demographic conditions within the City and other *de facto* conditions beyond the control and responsibility of the School Board, including

> the voluntary withdrawal of white students from the system, have become the causative factors for the present racial composition of the student body in those schools and not the original action of the Board in creating segregated schools at these locations. It should be recalled in this connection that the plan previously approved included provision for students to elect to transfer from a school in which they were in a majority to a school in which they would be in a minority.

While the cause of the departure of white students was disputed, there can be little doubt upon the record that the difference between the anticipated mix and the actual attendance of the high schools when the plan was put into effect was due to a substantial departure of white students from the public schools in Chattanooga, a circumstance which the district judge found to have occurred beyond the control and responsibility of the School Board.

No one who firmly believes in the social and educational value of racial balance in a desegregated school system can help being seriously concerned when such a plan for achieving racial balance does not achieve its objectives on implementation. That such a concern was shared by the district judge is manifest throughout the entire record upon appeal. Nevertheless, the district judge concluded that the demographic changes in the city itself were the cause of the remaining imbalance, a finding which finds support in the record and which we hold is not clearly erroneous.

We are satisfied that, in giving final approval to the high school desegregation plan, Judge Wilson was by no means yielding to irrational concerns over white flight which merely masked inherent Board resistance to integration. To the contrary, he carried out the plan in spite of the apprehended result, and beyond that resisted the defendant Board's further efforts to modify the earlier approved plan for the remainder of the system with this language in his November 27, 1973 opinion:

> "The Court is not unsympathetic to the concern expressed by the Board for minimizing the voluntary departure of white students from the system. It must be apparent, however, that this objective cannot serve as a limiting factor on the constitutional requirement of equal protection of the laws, nor as a justification for retaining *de jure* segregation. Concern over 'white flight', as the phenomenon was often referred to in the record, cannot become the higher value at the expense of rendering equal protection of the laws the lower value. As stated by the United States Supreme Court in the case of *Monroe* v. *Board of Commissioners,* 391 U.S. 450 . . . :
>
> > "We are frankly told in the Brief that without the transfer option it is apprehended that white students will flee the school system altogether. 'But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of the disagreement with them.'" *Brown II* at 300, . . .
>
> "Moreover, it is the 'effective disestablishment of a dual racially segregated school system' that is required, *Wright* v. *Council of City of Emporia,* 407 U.S. 451 . . . not, as seems to be contended by the defendants, the most 'effective' level of voluntarily acceptable 'mixing' of the races." (Footnote omitted)

Having implemented the plan for desegregating the high schools by establishing zones for attendances which were designed to achieve a high degree of racial balance throughout the system, and having provided further for continuance of a majority-to-minority transfer policy, the district judge conceived that he had obeyed the mandate of *Brown* v. *Board of Education of Topeka II,* 349 U.S. 294 (1955) *(Brown II)* and more particularly of *Swann* v. *Charlotte-Mecklinburg of Education,* 402 U.S. 1 (1971). So do we. Presumably, the district judge might have ordered a further realignment when the first plan did not achieve the proper balance ratio, and yet

another if that did not hold. Indeed if such were found to have been required to carry out the constitutional mandate to eliminate the vestiges of a dual system, it would simply have to be done, and we have no doubt the district judge would faithfully have carried out that duty. What he was finally faced with here, however, was rather a more subtle and lingering malaise of fear and bias in the private sector which persisted after curative action had been taken to eliminate the dual system itself. *Swann* v. *Board of Education* recognizes that this latter may be beyond the effective reach of the Equal Protection Clause:

> "Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools."
>
> *Swann* v. *Board of Education, supra,* 402 U.S. at 23

Affirmed.

EDWARDS, Circuit Judge, dissenting. This appeal presents just one significant question: Should we now, under applicable Supreme Court precedent, affirm the District Judge's final order of December 18, 1973, approving a final desegregation order applicable to the Chattanooga high schools?

With all respect for the sincerity of my colleagues, I cannot join the majority opinion, or approve its result. If the majority opinion prevails in this court and in the Supreme Court, it will establish as law the proposition that approximately 60% of the black children in the high schools of the Chattanooga public school system may be continued forever in complete racial segregation in all black schools which were built as such under state law which required a racially dual school system and which have been continuously segregated as such down to this very moment. I cannot square this proposition with the great command of the Fourteenth Amendment to provide all American citizens "the equal protection of the laws."

The rule of this case is all the more significant because the smaller numbers, the maturity, and the greater mobility of high school students tend to make practical accomplishment of high school desegregation the least difficult part of the task mandated by *Brown* v. *Board of Education of Topeka,* 347 U.S. 483 (1954); *Green* v. *County School Board of New Kent County,* 391 U.S. 430 (1968) and *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971).

The en banc per curiam opinion of the Sixth Circuit (*Mapp* v. *Board of Education of the City of Chattanooga, Tennessee,* 477 F.2d 851 (6th Cir.), *cert. denied,* 414 U.S. 1022 (1973)) constituted unqualified approval of two previously entered opinions and judgments of Judge Wilson, *Mapp* v. *Board of Education of the City of Chattanooga,* 329 F. Supp. 1374 (E.D. Tenn. 1971); *Mapp.* v. *Board of Education of the City of Chattanooga,* 341 F. Supp. 193 (E.D. Tenn. 1972). In these two cases Judge Wilson had approved final desegregation orders concerning the grade schools and junior high schools. Equally

clearly, he had not approved any final desegregation plan for the high schools. As to the high schools, in his first opinion he said:

High Schools

> During the school year 1970-71, the Chattanooga School System operated five high schools. These included four general curricula high schools and one technical high school. Kirkman Technical High School offers a specialized curricula in the technical and vocational field and is the only school of its kind in the system. It draws its students from all areas of the City and is open to all students in the City on a wholly non-discriminatory basis pursuant to prior orders of this Court. Last year Kirkman Technical High School had an enrollment of 1218 students, of which 129 were black and 1089 were white. The relatively low enrollment of black students was due in part to the fact that Howard High School and Riverside High School, both of which were all black high schools last year, offered many of the same technical and vocational courses as were offered at Kirkman. Under the defendants' plan these programs will be concentrated at Kirkman with the result that the enrollment at Kirkman is expected to rise to 1646 students, with a racial composition of 45% black students and 55% white students. No issue exists in the case but that Kirkman Technical High School is a specialized school, that it is fully desegregated, and that it is a unitary school.
>
> While some variation in the curricula exists, the remaining four high schools, City High School, Brainerd High School, Howard High School, and Riverside High School, each offer a similar general high school curriculum. At the time when a dual school system was operated by the School Board, City High School and Brainerd High School were operated as white schools and Howard High School and Riverside High School were operated as black schools. At that time the black high schools were zoned, but the white high schools were not. When the dual school system was abolished by order of the Court in 1962, the defendants proposed and the Court approved a freedom of choice plan with regard to the high schools. The plan accomplished some desegregation of the former white high schools, with City having 141 black students out of an enrollment of 1435 and Brainerd having 184 black students out of an enrollment of 1344 during the 1970-71 school year. However, both Howard, with an enrollment of 1313, and Riverside, with an enrollment of 1057, remained all black. The freedom of choice plan "having failed to undo segregation • • • freedom of choice must be held unacceptable." Green v. County School Board of New Kent County, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).
>
> The School Board proposes to accomplish a unitary school system within the high schools by zoning the four general curricula high schools with the following results in terms of student ratios:

	Black Students	White Students
Brainerd High School	32%	68%
Chattanooga High School	44%	56%
Howard High School	75%	25%
Riverside High School	75%	25%

> The plaintiffs have interposed objections to the defendants' high school plan upon the ground that it does not achieve a racial balance in each school. To some extent these objections are based upon matters of educational policy rather than legal requirements. It is of course apparent that the former white high schools, particularly Brainerd High School, remain predominantly white and that the former black high schools remain predominantly black. However, the defendants offer some evidence in support of the burden cast upon them to justify the remaining imbalance. The need for tying the high school zones to feeder junior high schools is part of the defendants' explanation. Residential patterns, natural geographical features, arterial highways, and other factors are also part of the defendants' explanation.

A matter that has given concern to the Court, however, and which the Court feels is not adequately covered in the present record, is the extent to which the statistical data upon which the defendants' plan is based will correspond with actual experience. Among other matters there appears to be substantial unused capacity in one or more of the city high schools. Before the Court can properly evaluate the reliability of the statistical data regarding the high schools, the Court needs to know whether the unused capacity does in fact exist and, if so, where it exists, whether it will be used and, if so, how it will be used. It would be unfortunate indeed if experience shortly proved the statistical data inadequate and inaccurate and this Court was deprived of the opportunity of considering those matters until on some appellate remand, as occurred in the recent case of Davis v. Board of School Commissioners of Mobile, 402 U.S. 33, 91 S.Ct. 1289, 28 L.Ed.2d 577.

The plaintiff has submitted a high school plan with high school zones which the plaintiff's witness has testified will achieve a racial balance in each high school. However, this plan is not tied into the junior high school plan hereinabove approved and the Court is unable to say whether it could be so tied it. Furthermore, the same statistical problem discussed above would appear to exist with regard to the plaintiff's plan.

The Court accordingly is unable to give final approval to a high school desegregation plan at this time. Time, however, is a pressing factor. Pre-school activities will commence at each high school within less than a week, if in fact they have not already commenced. Full commencement of the fall term is only one month away. It is clear that the high schools must move at least as far as is proposed in the defendants' high school plan. Accordingly, the Court will give tentative approval only at this time to the defendants' high school plan in order that at least as much as is therein proposed may be placed into operation at the commencement of the September 1971 term of school. Further prompt but orderly judicial pro-

ceedings must ensue before the Court can decide upon a final plan for desegregation of the high schools.

In the meanwhile, the defendants will be required to promptly provide the Court with information upon the student capacity of each of the four high schools under discussion, upon the amount of unused space in each of the four high schools, the suitability of such space for use in high school programs, and the proposed use to be made of such space, if any. In this connection the defendants should likewise advise the Court regarding its plan as to tuition students. Last year almost one-third of the total student body at City High School were non-resident tuition paying students. There is no information in the present record as to the extent the Board proposes to admit tuition students nor the effect this might have on the racial composition of the student body. The Court has no disapproval of the admission of tuition students nor to the giving of preference to senior students in this regard, provided that the same does not materially and unfavorably distort the student racial ratios in the respective schools. Otherwise, the matter of admitting tuition students addresses itself solely to the discretion of the Board. No later than the 10th day of enrollment the defendants will provide the Court with actual enrollment data upon each of the four high schools here under discussion.

Mapp v. *Board of Education of the City of Chattanooga, supra* at 1384-86.

In his second opinion he said:

Tentative approval only having heretofore been given to the School Board plan for desegregation of the Chattanooga high schools other than Kirkman Technical High School (to which final approval has been given). Further consideration must be given to this phase of the plan. At the time that the Court gave its tentative approval to the high school desegregation plan, the Court desired additional information from the Board of Education as to

whether three, rather than four, general purpose high schools would be feasible or desirable in Chattanooga. It now appears, and in this both parties are in agreement, that three general purpose high schools rather than four is not feasible or desirable, at least for the present school year. Having resolved this matter to the satisfaction of the Court, the defendant Board of Education will accordingly submit a further report on or before June 15, 1972, in which they either demonstrate that any racial imbalance remaining in the four general purpose high schools is not the result of "present or past discriminatory action on their part" Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. at 26, 91 S.Ct. at 1281, 28 L.Ed.2d 554 at 572, or otherwise, and to the extent that the Board is unable to demonstrate that such racial imbalance which remains is not the result of past or present discriminatory action, they should submit a further plan for removal of all such remaining racial discrimination, the further plan likewise to be submitted on or before June 15, 1972.

> *Mapp* v. *Board of Education of the City of Chattanooga, supra* at 200.

The opinion and order we now review are quite different, and if approved by this Court and the Supreme Court, would represent both a final approval of the school board's current "plan" for operation of the high schools and holding that the present operation represents desegregation of the previously legally segregated dual high school system.

In the opinion we now review Judge Wilson said:

> The Court is accordingly of the opinion that the defendants have failed to establish either such changed conditions as would render its formerly court-approved plan of school desegregation inadequate or improper to remove "all remaining vestiges of state imposed segregation" or that its newly proposed plan would accomplish that result.
>
> To the extent that the Court has previously given only tentative approval to the high school zoning plan, final

> approval will now be given that plan. Two high schools, Howard High School and Riverside High School, have not acquired an enrollment of white students as projected by the Board when the plan was proposed in 1971, but rather have remained substantially all black. It was a concern for the accuracy of these projections that caused the Court to initially give only tentative approval to the high school zoning plan. However, subsequent evidence has now demonstrated that changing demographic conditions within the City and other *de facto* conditions beyond the control and responsibility of the School Board, including the voluntary withdrawal of white students from the system, have become the causative factors for the present racial composition of the student body in those schools and not the original action of the Board in creating segregated schools at these locations. It should be recalled in this connection that the plan previously approved included provision for students to elect to transfer from a school in which they were in a majority to a school in which they would be in a minority.
>
> *Mapp* v. *Board of Education of the City of Chattanooga,* 366 F. Supp. 1257, 1260-61 (E.D. Tenn. 1973).

Thus, clearly, we now have before us the issue as to whether or not in the Chattanooga high schools previous unconstitutional segregation has been eliminated "root and branch." *Green* v. *County School Board of New Kent County,* 391 U.S. 430 (1968).

Defendant-appellees accept (as they must) the responsibility of meeting the standard of *Green* v. *County School Board of Kent County, supra*:

> It is against this background that 13 years after *Brown II* commanded the abolition of dual systems we must measure the effectiveness of respondent School Board's "freedom-of-choice" plan to achieve that end. The School Board contends that it has fully discharged its obligation by adopting a plan by which every student, regardless of race, may "freely" choose the school he will attend. The

Board attempts to cast the issue in its broadest form by arguing that its "freedom-of-choice" plan may be faulted only by reading the Fourteenth Amendment as universally requiring "compulsory integration," a reading it insists the wording of the Amendment will not support. But that argument ignores the thrust of *Brown II*. In the light of the command of that case, what is involved here is the question whether the Board has achieved the "racially nondiscriminatory school system" *Brown II* held must be effectuated in order to remedy the established unconstitutional deficiencies of its segregated system. In the context of the state-imposed segregated pattern of long standing, the fact that in 1965 the Board opened the doors of the former "white" school to Negro children and of the "Negro" school to white children merely begins, not ends, our inquiry whether the Board has taken steps adequate to abolish its dual, segregated system. *Brown II* was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. See *Cooper* v. *Aaron, supra,* at 7; *Bradley* v. *School Board,* 382 U.S. 103; cf. *Watson* v. *City of Memphis,* 373 U.S. 526. The constitutional rights of Negro school children articulated in *Brown I* permit no less than this; and it was to this end that *Brown II* commanded school boards to bend their efforts.[4]

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[4] "We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States,* 380 U. S. 145, 154. Compare the remedies discussed in, *e. g., NLRB* v. *Newport News Shipbuilding & Dry Dock Co.,* 308 U. S. 241;

In determining whether respondent School Board met that command by adopting its "freedom-of-choice" plan, it is relevant that this first step did not come until some 11 years after *Brown I* was decided and 10 years after *Brown II* directed the making of a "prompt and reasonable start." This deliberate perpetuation of the unconstitutional dual system can only have compounded the harm of such a system. Such delays are no longer tolerable, for "the governing constitutional principles no longer bear the imprint of newly enunciated doctrine." *Watson* v. *City of Memphis, supra,* at 529; see *Bradley* v. *School Board, supra; Rogers* v. *Paul,* 382 U.S. 198. Moreover, a plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is also intolerable. "The time for mere 'deliberate speed' has run out," *Griffin* v. *County School Board,* 377 U.S. 218, 234; "the context in which we must interpret and apply this language [of *Brown II*] to plans for desegregation has been significantly altered." *Goss* v. *Board of Education,* 373 U.S. 683, 689. See *Calhoun* v. *Latimer,* 377 U.S. 263. The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now.*

Green v. *County School Board of New Kent County, supra* at 437-39.

At the outset we note that we deal with a school district which at the time of the beginning of this litigation was clearly and concededly a dual school system segregated by race according to state statute. We therefore are required to determine whether or not a public school system (racially constituted during the 1973-74 school year as follows) can be held by this court to have been desegregated "root and branch":

United States v. *Crescent Amusement Co.,* 323 U. S. 173; *Standard Oil Co.* v. *United States,* 221 U. S. 1. See also *Griffin* v. *County School Board,* 377 U. S. 218, 232-234.

	White	Black	% White	% Black
Howard	10	999	1	99
Riverside	3	721	1	99
Chattanooga	439	330	57	43
Brainerd	646	404	61	39

There can, of course, be no doubt that Howard and Riverside High Schools are "racially separate public schools established and maintained by state action." *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 5 (1971). Both were built as Negro schools under state law which required a dual school system. T.C.A. §§ 2377, 2393.9 (Williams 1934). Twenty-one years after decision of *Brown* v. *Board of Education of Topeka,* 347 U.S. 483 (1954), both high schools (encompassing 60% of the black high school population of Chattanooga) are still (and always have been) essentially 100% black. As to these schools and students, there has been no desegregation at all.

Defendants-Appellees contend that two measures which they took should be accepted as the equivalent of desegregation. They are: 1) the inauguration of a freedom of choice plan, and 2) a change in zone boundaries which was calculated (it is claimed) to introduce 25% of white students into both high schools. Defendants-appellees freely admit that neither measure was effective in changing the segregated character of the Howard and Riverside High Schools.

At to the freedom of choice plans, the Supreme Court has repeatedly held that ineffective freedom of choice plans are not a substitute for desegregation in fact. *See Green* v. *County School Board of New Kent County, supra; Monroe* v. *Board of Commissioners of the City of Jackson,* 391 U.S. 450 (1968).

Defendants-appellees' strongest reliance is upon the second contention that they "zoned" 25% white students into Howard and Riverside but that the white students thus assigned avoided the assignment by "white-flight." As to this measure, we have

no findings of fact concerning defendants-appellees' contention. But if we assumed their truth, we clearly would not have exhausted the possibilities for successful desegregation nor satisfied the constitutional command. Many possibilities for desegregation remain, including pairing of white and black schools and high school construction which would make desegregated zones more feasible. In any instance, the defendant school board should be required to propose a new and realistic plan to meet its constitutional duty. *See Swann* v. *Charlotte-Mecklenburg Board of Education, supra,* at 15-21; *Brinkman* v. *Gilligan,* — F.2d — (6th Cir. 1975) (Decided June 24, 1975, No. 75-1410).

In my judgment the case should be affirmed as to the grade schools and junior high schools. The judgment should be vacated and remanded as to the high schools. All other issues presented by either party should be summarily denied.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 74-2100

JAMES JONATHAN MAPP, et al.,
Plaintiffs-Appellants,

v.

THE BOARD OF EDUCATION OF THE CITY
OF CHATTANOOGA, et al.,
Defendants-Appellees.

ORDER

(Filed January 27, 1976)

Before: WEICK, EDWARDS and ENGEL, Circuit Judges.

This cause came on for hearing on the petition for rehearing with a suggestion that it be reheard en banc.

Judges Edwards and McCree having requested en banc rehearing for the reasons set forth in Judge Edwards' dissenting opinion, but it appearing to the court that less than a majority of the court has voted in favor thereof, the petition for rehearing was referred to the panel which originally heard the appeal and was determined not to be well taken, Judge Edwards dissenting.

It is therefore ordered that the petition for rehearing be denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

Re: James Jonathan Mapp v.
The Board of Education of the City
of Chattanooga, Tennessee

No. 74-2100

EDWARDS, Circuit Judge, dissenting. Although the Board of Education of the City of Chattanooga has at long last, under orders of the Supreme Court of the United States, this court, and the United States District Court, proceeded to bring both its grade schools and junior high schools into compliance with the Constitution of the United States, as to two of its high schools it has signally failed to do so. The majority opinion of this court would establish as law the proposition that approximately 60% of the black children of the Chattanooga high school system may be continued forever in complete segregation in all black high schools. The two black high schools at issue were built as such under state law that required a racially dual school system and have been continuously segregated as such down to this very moment.

There can be no doubt that the two black high schools are racially separate public schools established and maintained by state action and that as to these schools there has been no desegregation at all. In my judgment it simply cannot be said with any accuracy that the possibilities for successful desegregation have been exhausted. As to these schools the School Board should be required to propose a new and realistic and effective plan to meet its constitutional duty.

Report #5-A Elementary Schools

CHATTANOOGA PUBLIC SCHOOLS
Chattanooga, Tennessee

COMPARISON OF TENTH DAY PUPIL ENROLLMENT FOR EACH SCHOOL BY YEAR AND BY RACE
FROM 1962-63 TO PRESENT

Elementary Schools

School Year	Annicola (1-6)			Avondale (1-6)			Barger (1-6)			Bell (1-6)			Brown (1-6)			Carpenter (1-6)			Chatta. Avenue (1-6)			Cedar Hill (1-6)		
	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T
	10th Day Enrollment (Resident and Nonresident Pupils)																							
* 1962-63	---	---	---	0	317	317	0	561	561	622	0	622	0	368	368	501	0	501	524	0	524	0	171	171
** 1963-64	---	---	---	318	170	488	0	543	543	592	0	592	0	332	332	Closed - East Fifth Street			481	0	481	0	148	148
*** 1964-65	---	---	---	639	18	657	0	569	569	573	0	573	1	319	320	---	---	---	372	0	372	0	139	139
**** 1965-66	---	---	---	629	27	656	0	547	547	564	0	564	2	306	308	---	---	---	Closed - Howard Railroad Relocation			0	196	196
***** 1966-67	---	---	---	641	18	659	0	518	518	545	0	545	114	288	402	Opened Middle School			---	---	---	0	210	210
1967-68	---	---	---	648	17	665	0	478	478	576	0	576	112	264	376	373	(1-4) 19	392	---	---	---	0	187	187
1968-69	Annexed from County			683	7	690	0	494	494	574	0	574	125	243	368	331	26	357	---	---	---	0	162	162
1969-70	69	63	132	672	5	677	2	432	434	561	6	567	122	236	358	344	10	354	---	---	---	0	176	176
1970-71	75	35	110	640	1	641	2	453	455	514	9	523	121	216	337	301	8	309	---	---	---	0	174	174
1971-72	Closed-Carpenter and Rivermont			669	0	669	71	(4-6) 258	329	416	2	418	106	205	311	406	(1-6) 46	452	---	---	---	Closed-East Lake		
1972-73	---	---	---	660	0	660	90	(4-6) 222	312	421	2	423	108	210	318	337	27	364	---	---	---	---	---	---
1973-74	---	---	---	629	0	629	93	208	301	380	2	382	101	199	300	310	13	323	---	---	---	---	---	---
1974-75																								
1975-76																								
1976-77				-																				
1977-78																								
1978-79																								
1979-80																								

Desegregation Schedule: *16 Schools (1-3) **All Schools (1-4) ***All Schools (1-6) ****All Schools (1-7) *****All Schools (1-12)

APPENDIX B 20a

Elementary Schools (Continued)

School Year	Clifton Hills (1-6)			Davenport (1-6)			Donaldson (1-6)			East Chatta. (1-6)			East Fifth (1-6)			East Lake (1-6)			Eastdale (1-6)			Fort Cheatham (1-6)		
	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T
10th Day Enrollment (Resident and Nonresident Pupils)																								
1962-63 *	0	496	496	394	0	394	562	0	562	0	484	484	710	0	710	0	696	696	1	484	485	155	0	155
1963-64 **	0	513	513	397	3	400	543	0	543	3	540	543	862	(1-6) 1	863	0	744	744	20	506	526	87	0	87
1964-65 ***	0	514	514	355	7	362	533	0	533	20	523	543	609	41	650	0	699	699	37	453	490	Closed Nov. 1963 (Freeway)		
1965-66 ****	0	516	516	354	14	368	536	0	536	21	477	498	603	32	635	0	623	623	51	440	491	---	---	---
1966-67 *****	11	518	529	308	16	324	519	0	519	23	465	488	610	24	634	0	601	601	50	444	494	---	---	---
1967-68	19	465	484	284	19	303	502	0	502	16	448	464	208	(5-6) 3	211	1	562	563	71	360	431	---	---	---
1968-69	17	447	464	275	18	293	541	0	541	8	422	430	200	10	210	1	540	541	108	315	423	---	---	---
1969-70	18	446	464	255	9	264	512	0	512	7	410	417	152	4	156	1	470	471	150	261	411	---	---	---
1970-71	17	411	428	234	9	243	471	0	471	12	382	394	146	7	153	3	439	442	234	180	414	---	---	---
1971-72	27	311	338	Closed - Howard Hemlock			462	0	462	41	381	422	---	Closed ---	---	3	530	533	169	(4-6) 170	339	---	---	---
1972-73	39	359	398	---	---	---	437	0	437	91	374	465	---	---	---	2	512	514	244	142	386	---	---	---
1973-74	31	349	380	---	---	---	419	0	419	106	280	386	---	---	---	4	455	459	336	111	447	---	---	---
1974-75																								
1975-76																								
1976-77																								
1977-78																								
1978-79																								
1979-80																								

Desegregation Schedule: *16 Schools (1-3) **All Schools (1-4) ***All Schools (1-6) ****All Schools (1-7) *****All Schools (1-12)

Elementary Schools (Continued)

10th Day Enrollment (Resident and Nonresident Pupils)

School Year	Garber (1-6)			Glenwood (1-6)			Henry (1-6)			Hemlock (1-6)			Highland Park (1-6)			Howard (1-6)			Long (1-6)			Missionary Ridge (1-6)		
	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T
* 1962-63	0	338	338	19	175	194	328	0	328	0	324	324	0	415	415	684	0	684	1	320	321	5	380	385
** 1963-64	0	347	347	60	125	185	285	0	285	0	288	288	0	377	377	662	0	662	3	301	304	5	376	381
*** 1964-65	0	353	353	103	87	190	250	0	250	19	281	300	0	405	405	606	0	606	0	336	336	4	376	380
**** 1965-66	0	396	396	106	63	169	294	0	294	37	262	299	0	414	414	806	2	808	1	358	359	5	374	379
***** 1966-67	1	319	320	130	28	158	336	0	336	54	242	296	0	404	404	783	0	783	5	331	336	6	358	364
1967-68	5	317	322	141	14	155	359	0	359	89	224	313	0	364	364	726	0	726	8	384	392	5	335	340
1968-69	65	253	318	160	17	177	351	1	352	110	204	314	0	378	378	673	0	673	14	449	463	5	330	335
1969-70	155	188	343	208	7	215	408	0	408	83	184	267	0	382	382	636	0	636	29	408	437	7	327	334
1970-71	242	135	377	246	2	248	376	0	376	66	195	261	4	351	355	617	0	617	52	367	419	11	319	330
1971-72	296	91	387	Closed-M. Ridge Ridgedale-O		Knob	371	0	371	158	175	333	24	264	288	615	4	619	54	317	371	158	146	304
1972-73	310	49	359	---	---	---	339	0	339	158	159	317	17	233	250	522	4	526	42	279	321	153	92	245
1973-74	343	33	376	---	---	---	298	0	298	142	139	281	24	180	204	466	3	469	55	299	354	159	65	224
1974-75																								
1975-76																								
1976-77																								
1977-78																								
1978-79																								
1979-80																								

Desegregation Schedule: *16 Schools (1-3) **All Schools (1-4) ***All Schools (1-6) ****All Schools (1-7) *****All Schools (1-12)

Elementary Schools (Continued)

School Year	Normal Park (1-6)			Oak Grove (1-6)			Orchard Knob (1-6)			Pineville (1-6)			Piney Woods (1-6)			Ridgedale (1-6)			Rivermont (1-6)			Sanderson (1-6)		
	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T
10th Day Enrollment (Resident and Nonresident Pupils)																								
1962-63 *	0	552	552	0	444	444	1189	0	1189	---	---	---	---	---	---	0	364	364	---	---	---	145	0	145
1963-64 **	0	531	531	42	430	472	1185	0	1185	---	---	---	Opened January 1964 (New)			7	354	361	---	---	---	164	0	164
1964-65 ***	0	541	541	77	406	483	1048	0	1048	---	---	---	370	0	370	46	368	414	---	---	---	136	3	139
1965-66 ****	0	563	563	72	393	465	1057	0	1057	---	---	---	369	0	369	45	383	428	---	---	---	168	0	168
1966-67 *****	0	574	574	71	354	425	1033	0	1033	---	---	---	365	0	365	76	339	415	---	---	---	154	0	154
1967-68	2	586	588	67	331	398	1018	0	1018	Annexed from County			358	0	358	68	303	371	---	---	---	140	0	140
1968-69	4	565	569	61	328	389	955	0	955	0	131	131	355	4	359	83	270	353	Annexed from County			Closed-Consolidated with Howard, St.		
1969-70	0	535	535	66	301	367	926	0	926	0	152	152	334	4	338	93	252	345	0	554	554	Elam & Donaldson ---	---	---
1970-71	0	535	535	67	257	324	788	3	791	0	153	153	307	1	308	82	252	334	0	561	561	---	---	---
1971-72	2	365	367	71	226	297	731	4	735	0	153	153	277	2	279	92	201	293	73	532	605	---	---	---
1972-73	4	366	370	104	199	303	694	2	696	0	157	157	271	0	271	98	204	302	65	505	570	---	---	---
1973-74	4	406	410	119	180	299	702	1	703	1	174	175	272	0	272	98	188	286	47	455	502	---	---	---
1974-75																								
1975-76																								
1976-77																								
1977-78																								
1978-79																								
1979-80																								

Desegregation Schedule: *16 Schools (1-3) **All Schools (1-4) ***All Schools (1-6) ****All Schools (1-7) *****All Schools (1-12)

Elementary Schools (Continued)

School Year	10th Day Enrollment (Resident and Nonresident Pupils)																							
	St. Elmo (1-6)			Smith (1-6)			Spears Avenue (1-6)			Sunnyside (1-6)			Trotter (1-6)			Woodmore (1-6)			Hillcrest (1-6)			Total Elementary (1-6)		
	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T
1962-63 *	6	338	344	601	0	601	99	0	99	14	309	323	555	0	555	0	562	562				7115	8078	15193
1963-64 **	9	351	360	558	0	558	98	0	98	38	284	322	513	0	513	0	546	546				6932	7810	14742
1964-65 ***	15	344	359	488	0	488	97	0	97	70	298	368	434	0	434	0	549	549				6902	7629	14531
1965-66 ****	17	359	376	443	0	443	100	0	100	72	269	341	431	0	431	0	566	566				6783	7580	14363
1966-67 *****	18	346	364	405	0	405	Closed-Consolidated with Brown			80	286	366	388	0	388	0	538	538				6726	7221	13947
1967-68	19	306	325	404	0	404	---	---	---	102	246	348	347	0	347	0	497	497				6668	6729	13397
1968-69	54	316	370	352	0	352	---	---	---	137	192	329	349	0	349	2	490	492				6593	6612	13205
1969-70	47	294	341	323	0	323	---	---	---	132	202	334	328	0	328	18	505	523				6658	6823	13481
1970-71	54	322	376	297	1	298	---	---	---	134	175	309	311	0	311	22	451	473				6446	6404	12850
1971-72	62	245	307	285	0	285	---	---	---	58	(1-3) 250	308	304	0	304	195	(1-3) 220	415				6196	5098	11294
1972-73	63	245	308	241	1	242	---	---	---	61	(1-3) 209	270	245	0	245	227	(1-3) 173	400	Annexed from County			6043	4725	10768
1973-74	67	221	288	224	3	227	---	---	---	53	172	225	230	0	230	248	144	392	56	374	430	6017	4654	10671
1974-75																								
1975-76																								
1976-77																								
1977-78																								
1978-79																								
1979-80																								

Desegregation Schedule: *16 Schools (1-3) **All Schools (1-4) ***All Schools (1-6) ****All Schools (1-7) *****All Schools (1-12)

Report #5-B Junior High Schools

Junior High Schools

School Year	Alton Park (7-9)			Brainerd (7-9)			Dalewood (7-9)			East Fifth (-)			East Lake (7-9)			East Side (7-9)			Hardy (7-9)			Howard (7-9)		
	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T
	10th Day Enrollment (Resident and Nonresident Pupils)																							
* 1962-63	818	0	818	0	1100	1100	Opened Fall 63-64		(New)	329	0	329	0	637	637	0	610	610	0	611	611	887	0	887
** 1963-64	837	0	837	0	590	590	0	467	467	Closed-Transferred to Riverside			0	605	605	0	559	559	0	546	546	879	0	879
*** 1964-65	905	0	905	0	600	600	0	491	491	---	---	---	0	589	589	0	587	587	0	473	473	853	0	853
**** 1965-66	913	0	913	7	607	614	9	522	531	---	---	---	0	580	580	27	627	654	99	440	539	740	1	741
***** 1966-67	893	0	893	33	649	682	28	579	607	---	---	---	0	621	621	91	618	709	217	356	573	652	0	652
1967-68	888	0	888	53	661	714	37	613	650	339	(7-8) 6	345	1	602	603	112	646	758	331	292	623	619	0	619
1968-69	889	4	893	58	621	679	55	590	645	296	8	304	1	595	596	119	629	748	304	305	609	612	1	613
1969-70	843	7	850	61	565	626	72	542	614	290	1	291	0	565	565	118	606	724	384	268	652	642	0	642
1970-71	835	7	842	67	521	588	105	470	575	243	2	245	1	531	532	130	593	723	426	190	616	622	0	622
1971-72	781	3	784	115	370	485	200	326	526	335	(7-9) 1	336	1	447	448	148	476	624	550	166	716	552	0	552
1972-73	741	2	743	145	306	451	245	219	464	309	(7-9) 1	310	3	438	441	113	389	502	508	139	647	513	0	513
1973-74	655	2	657	157	250	407	348	197	545	279	1	280	1	380	381	126	365	491	505	96	601	473	1	474
1974-75																								
1975-76																								
1976-77																								
1977-78																								
1978-79																								
1979-80																								

Desegregation Schedule: *16 Schools (1-3) **All Schools (1-4) ***All Schools (1-6) ****All Schools (1-7) *****All Schools (1-12)

Junior High Schools (Continued)

School Year	10th Day Enrollment (Resident and Nonresident Pupils)																							
	Kirkman (9)			Long (7-9)			Lookout (7-9)			North Chattanooga (7-9)			Orchard Knob (7-9)			Park Place (7-9)			Riverside (7-9)			Total Junior High (7-9)		
	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T
*1962-63	0	177	177	0	134	134	0	186	186	0	530	530	762	0	762	247	0	247	---	---	---	3043	3985	7028
**1963-64	0	165	165	0	118	118	0	165	165	0	589	589	752	0	752	Closed Riverside			850	0	850	3318	3804	7122
***1964-65	0	153	153	0	125	125	0	148	148	0	603	603	797	0	797	---	---	---	894	0	894	3449	3769	7218
****1965-66	---	Closed ---	---	4	135	139	37	149	186	12	625	637	798	0	798	---	---	---	785	0	785	3431	3586	7117
*****1966-67	---	---	---	7	134	141	54	156	210	36	581	617	745	0	745	---	---	---	598	2 (9)	600	3354	3696	7050
1967-68	---	---	---	10	141	151	71	165	236	54	605	659	696	0	696	---	---	---	181	0	181	3392	3731	7123
1968-69	---	---	---	33	185	218	77	161	238	61	674	735	675	0	675	---	---	---	184	0	184	3364	3773	7137
1969-70	---	---	---	35	175	210	70	147	217	63	744	807	623	0	623	---	---	---	165	0	165	3366	3620	6986
1970-71	---	---	---	28	165	193	89	148	237	62	723	785	653	0	653	---	---	---	138	0	138	3399	3350	6749
1971-72	---	---	---	21	151	172	84	115	199	57	651	708	493	0	493	---	---	---	Transferred to East Fifth St.			3337	2706	6043
1972-73	---	---	---	28	149	177	83	123	206	63	589	652	457	0	457	---	---	---	---	---	---	3208	2355	5563
1973-74	---	---	---	28	165	193	87	102	189	78	567	645	385	0	385	---	---	---	---	---	---	3122	2126	5248
1974-75																								
1975-76																								
1976-77																								
1977-78																								
1978-79																								
1979-80																								

Desegregation Schedule: *16 Schools (1-3) **All Schools (1-4) ***All Schools (1-6) ****All Schools (1-7) *****All Schools (1-12)

Report #5-C Senior High Schools

Senior High Schools

School Year	10th Day Enrollment (Resident and Nonresident Pupils)																									Total Senior High (10-12)		
	Brainerd High (10-12)			Chattanooga High (10-12)			Howard High (10-12)			Kirkman Technical (10-12)			Riverside High (10-12)															
	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T	B	W	T
* 1962-63	0	896	896	0	1059	1059	1580	0	1580	0	989	989	---	---	---											1580	2944	4524
** 1963-64	0	1001	1001	0	1189	1189	1033	0	1033	0	1037	1037	944	0	944											1977	3227	5204
*** 1964-65	0	1070	1070	0	1295	1295	1177	0	1177	0	1051	1051	1111	0	1111											2288	3416	5704
**** 1965-66	0	1103	1103	0	1253	1253	1304	0	1304	0	1080	1080	1260	0	1260											2564	3436	6000
***** 1966-67	26	1085	1111	35	1225	1260	1348	0	1348	1	1057	1058	1389	0	1389											2799	3367	6166
1967-68	54	1089	1143	57	1227	1284	1407	0	1407		1069	1072	1341	1	1342											2862	3386	6248
1968-69	88	1131	1219	66	1264	1330	1427	0	1427	29	1079	1108	1267	0	1267											2877	3474	6351
1969-70	170	1224	1394	83	1359	1442	1415	0	1415	64	1118	1182	1124	0	1124											2856	3701	6557
1970-71	184	1160	1344	141	1294	1435	1313	0	1313	129	1089	1218	1057	1	1058											2824	3544	6368
1971-72	463	933	1396	369	733	1102	1089	44	1133	274	818	1092	693	25	718											2888	2553	5441
1972-73	509	766	1275	394	611	1005	941	7	948	366	761	1127	640	4	644											2850	2149	4999
1973-74	528	639	1167	369	502	871	887	5	892	474	660	1084	615	4	619											2823	1810	4633
1974-75																												
1975-76																												
1976-77																												
1977-78																												
1978-79																												
1979-80																												

Desegregation Schedule: *16 Schools (1-3) **All Schools (1-4) ***All Schools (1-6) ****All Schools (1-7) *****All Schools (1-12)